DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1472
Title: Kouichi Taniguchi, Petitioner
v.
Kan Pacific Saipan, Ltd., dba Marianas Resort and Spa
Docketed: June 6, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (09-15212)
Decision Date: March 8, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jun 3 2011	Petition for a writ of certiorari filed. (Response due July 6, 2011)
Jun 30 2011	Order extending time to file response to petition to and including August 5, 2011.
Aug 5 2011	Brief of respondent Kan Pacific Saipan, Ltd. in opposition filed.
Aug 15 2011	Reply of petitioner Kouichi Taniguchi filed.
Aug 17 2011	DISTRIBUTED for Conference of September 26, 2011.
Sep 27 2011	Petition GRANTED.
Oct 19 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including November 28, 2011.
Oct 19 2011	The time to file respondent's brief on the merits is extended to and including January 11, 2012.
Nov 16 2011	Consent to the fiing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Nov 23 2011	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondent.
Nov 28 2011	Joint appendix filed. (Statement of costs filed)
Nov 28 2011	Brief of petitioner Kouichi Taniguchi filed.
Dec 5 2011	Brief amicus curiae of National Association of Judiciary Interpreters and Translators filed.
Dec 5 2011	Brief amici curiae of Interpreting and Translation Professors filed.
Dec 19 2011	SET FOR ARGUMENT ON Tuesday, February 21, 2012.
Dec 23 2011	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Dec 23 2011	Record for U.S.D.C. for Mariana Islands (MNII) is electronic.
Jan 3 2012	CIRCULATED.
Jan 11 2012	Brief of respondent Kan Pacific Saipan, Ltd. filed. (Distributed)
Jan 18 2012	Brief amici curiae of Chicago Area Translators and Interpreters Association, et al. filed.

(Distributed)

Feb 2 2012 Record from Northern Mariana Islands (NMI) is electronic.

Feb 3 2012 Reply of petitioner Kouichi Taniguchi filed. (Distributed)

Feb 21 2012 Argued. For petitioner: Michael S. Fried, Washington, D. C. For respondent: Dan Himmelfarb, Washington, D. C.

May 21 2012 Judgment VACATED and case REMANDED. Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Thomas, and Kagan, JJ., joined. Ginsburg, J., filed a dissenting opinion, in which Breyer and Sotomayor, JJ., joined.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

101472 JUN 3 - 2011

OFFICE OF THE CLERK

No. 10-___

IN THE

Supreme Court of the United States

KOUICHI TANIGUCHI,

Petitioner.

v.

KAN PACIFIC SAIPAN, LTD.,
doing business as Marianas Resort and Spa.

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DOUGLAS F. CUSHNIE
P.O. BOX 500949
SAIPAN, MP 96950
(670) 234-6843

DONALD B. AYER
Counsel of Record
MICHAEL S. FRIED
CHRISTOPHER J. SMITH
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
dbayer@jonesday.com
(202) 879-3939

June 3, 2011

Counsel for Petitioner

QUESTION PRESENTED

Section 1920 of 28 U.S.C. sets out the categories of costs that may be awarded to the prevailing party in a federal lawsuit. One of the listed categories is "compensation of interpreters." *Id.* § 1920(6).

The question presented is whether costs incurred in translating written documents are "compensation of interpreters" for purposes of section 1920(6).

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Kouichi Taniguchi and Kan Pacific Saipan, Ltd. ("Kan Pacific"), doing business as Marianas Resort and Spa.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT 2

A. Statutory Background 2

B. Proceedings Below 5

REASONS FOR GRANTING THE PETITION 8

I. THE FEDERAL COURTS ARE SHARPLY DIVIDED OVER WHETHER TRANSLATORS OF A WRITTEN DOCUMENT ARE "INTERPRETERS" AS THAT WORD IS USED IN 28 U.S.C § 1920(6) 8

II. THIS CIRCUIT SPLIT INVOLVES AN ISSUE OF EXCEPTIONAL IMPORTANCE THAT WARRANTS REVIEW BY THIS COURT 12

III. THE DECISION BELOW IS WRONG ON THE MERITS 17

A. The Text and Structure of Section 1920(6) Foreclose Application to Document Translators 17

B. The Legislative History Confirms The Limitation to Spoken Interpretation 20

TABLE OF CONTENTS
(continued)

Page

C. Any Ambiguity Should Be Resolved Against Extending The Term "Interpreters" To Include One Who Translates Written Documents 22

CONCLUSION 24

APPENDIX A: Opinion of the United States Court of Appeals for the Ninth Circuit (Mar. 8, 2011) 1a

APPENDIX B: Unpublished Opinion of the United States Court of Appeals for the Ninth Circuit (Mar. 8, 2011) 9a

APPENDIX C: Opinion of the United States District Court for the Northern Mariana Islands (Dec. 22, 2008) 12a

APPENDIX D: Opinion of the United States District Court for the Northern Mariana Islands (Jan. 8, 2009) 19a

APPENDIX E: Opinion of the United States District Court for the Northern Mariana Islands (Jan. 15, 2009) 23a

APPENDIX F: Order of the United States Court of Appeals for the Ninth Circuit (May 11, 2011) 27a

APPENDIX G: Statutory Provisions Involved 28a

TABLE OF AUTHORITIES

Page(s)

CASES

Aerotech Res., Inc. v. Dodson Aviation, Inc.,
237 F.R.D. 659 (D. Kan. 2005) 13

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
421 U.S. 240 (1975)..... 2, 3, 14, 23

Arboireau v. Adidas Salomon AG,
No. CV-01-105-ST, 2002 WL 31466564
(D.Or. June 14, 2002) 13

Ardestani v. I.N.S.,
502 U.S. 129 (1991)..... 22

BTD Products, Inc. v. Lexmark Int'l, Inc.,
405 F.3d 415 (6th Cir. 2005) 7, 9

Castillo v. Teledyne Cont'l Motors, Inc.,
No. 08-21850, 2011 WL 1343051
(S.D. Fla. Mar. 16, 2011) 11, 12

Chacon v. El Milagro Care Ctr., Inc.,
No. 07-22835, 2010 WL 3023833
(S.D. Fla. July 29, 2010)..... 12

Chore-Time Equip., Inc. v. Cumberland Corp.,
713 F.2d 774 (Fed. Cir. 1983)..... 10

Comm'r of Internal Revenue v. Lundy,
516 U.S. 235 (1996)..... 19

Competitive Techs. v. Fujitsu, Ltd.,
No. C-02-1673, 2006 WL 6338914
(N.D. Cal. Aug. 23, 2006)..... 13

Conn v. Zakharov,
No. 1:09 CV 0760, 2010 WL 2293133
(N.D. Ohio June 4, 2010)..... 13

Crawford Fitting Co. v. J.T. Gibbons, Inc.,
482 U.S. 437 (1987)..... 2, 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Dahl v. United Techs. Corp.,
632 F.2d 1027 (3d Cir. 1980) 15

Dattner v. Conagra Foods, Inc.,
No. 01 Civ. 11297, 2005 WL 1963937
(S.D.N.Y. Aug. 16, 2005) 13

Delaware Valley Floral Grp., Inc. v. Shaw Rose Nets, LLC,
No. 07-20199, 2009 WL 5127937
(S.D. Fla. Dec. 17, 2009) 11, 13

Delaware Valley Floral Grp., Inc. v. Shaw Rose Nets, LLC,
No. 07-20199, 2009 WL 5127941
(S.D. Fla. Nov. 6, 2009) 11

Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.,
514 U.S. 122 (1995) 19

Dong Ah Tire & Rubber Co. v. Glasforms, Inc.,
No. C06-3359JF, 2010 WL 1691869
(N.D. Cal. Apr. 23, 2010) 13

Extra Equipamentos E Exportação Ltda. v. Case Corp.,
541 F.3d 719 (7th Cir. 2008) ..... *passim*

F. Hoffmann-La Roche Ltd. v. Empagran S.A.,
542 U.S. 155 (2004) 23

Flores-Torres v. Holder,
Nos. C08-01037, C09-03569,
2010 WL 1910011 (N.D. Cal. May 11, 2010) 22

Friends for All Children, Inc. v. Lockheed Aircraft Corp.,
717 F.2d 602 (D.C. Cir. 1983) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Gabriel Techs. Corp. v. Qualcomm, Inc.,
No. 08CV1992, 2010 WL 3718848
(S.D. Cal. Sept. 20, 2010) 12

Galvez v. Cuevas,
No. 08-80378, 2009 WL 1024632
(S.D. Fla. Apr. 15, 2009) 11, 13

Gidding v. Anderson,
No. C07-04755, 2008 WL 5068524
(N.D. Cal. Nov. 24, 2008) 13

Horizon Hobby, Inc. v. Ripmax Ltd.,
No. 07-CV-2133, 2009 WL 3381163
(C.D. Ill. Oct. 15, 2009) 13

Hynix Semiconductor Inc. v. Rambus Inc.,
697 F. Supp. 2d 1139 (N.D. Cal. 2010) 13

In re Puerto Rico Elec. Power Auth.,
687 F.2d 501 (1st Cir. 1982) 10

In re Top Tankers Inc., Secs. Litig.,
No. 06 Civ. 13761, 2008 WL 2944620
(S.D.N.Y. July 31, 2008) 15

Lockett v. Hellenic Sea Transports, Ltd.,
60 F.R.D. 469 (E.D. Pa. 1973) 23

Maker's Mark Distillery, Inc. v. Diageo N. Am., Inc.,
No. 3:03-CV-93-H, 2010 WL 2651186
(W.D. Ky. June 30, 2010) 12

Merck Sharp & Dohme Pharms., SRL v. Teva Pharms. USA, Inc.,
No. 07-1596, 2010 WL 1381413
(D.N.J. Mar. 31, 2010) 12, 13

TABLE OF AUTHORITIES
(continued)

Page(s)

Neles-Jamesbury, Inc. v. Fisher Controls Int'l, Inc.,
140 F. Supp. 2d 104 (D. Mass. 2001) 13

Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co. of Va.,
464 U.S. 30 (1983)..... 23

Oetiker v. Jurid Werke, GmbH,
104 F.R.D. 389 (D.D.C. 1982)..... 10

Ortho-McNeil Pharm., Inc. v. Mylan Labs., Inc.,
No. 1:02CV32, 2008 WL 7384877
(N.D.W. Va. Aug. 18, 2008),
aff'd in part, vacated in part,
569 F.3d 1353 (Fed. Cir. 2009)..... 12, 13, 14

Osorio v. Dole Food Co.,
No. 07-22693, 2010 WL 3212065 (S.D. Fla. July 7, 2010)..... 11, 12

Pan Am. Grain Mfg. Co. v. Puerto Rico Ports Authority,
193 F.R.D. 26 (D.P.R. 2000) 13

Porcelanas Florencia, S.A. v. Caribbean Resort Suppliers, Inc.,
No. 06-22139, 2009 WL 1456338
(S.D. Fla. May 22, 2009)..... 12, 13

Quy v. Air Am., Inc.,
667 F.2d 1059 (D.C. Cir. 1981)..... 9, 10

Ricoh Corp. v. Pitney Bowes, Inc.,
No. 02-5639, 2007 WL 1852553
(D.N.J. June 26, 2007)..... 11, 13

Roadway Express, Inc. v. Piper,
447 U.S. 752 (1980) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

S.R. Galves Participacao, Importacao & Exporticau Ltda. v. Natural Source Int'l Ltd.,
No. 06 Civ. 10182, 2007 WL 1484465
(S.D.N.Y. May 21, 2007) 12, 13

Shared Medical Sys. v. Ashford Presbytarian Cmty. Hosp.,
212 F.R.D. 50 (D.P.R. 2002) 13

Shimek v. Michael Weinig AG,
No. Civ. 99-2015, 2003 WL 328038
(D. Minn. Feb. 10, 2003) 13

Slagenweit v. Slagenweit,
63 F.3d 719 (8th Cir. 1995) (per curiam) 10

Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct.,
482 U.S. 522 (1987) 16

Sorenson v. Sec'y of Treasury,
475 U.S. 851 (1986) 18

Studiengesellschaft Kohle mbH v. Eastman Kodak Co.,
713 F.2d 128 (5th Cir. 1983) 10

Tesler v. Costa Crociere S.p.A.,
No. 08-60323, 2009 WL 1851091
(S.D. Fla. June 29, 2009) 11, 13

Tharo Systems, Inc. v. Cab Produkttechnik,
No. 1:03CV0419, 2005 WL 1123595
(N.D. Ohio 2005) 13

Tilton v. Capital Cities/ABC, Inc.,
115 F.3d 1471 (10th Cir. 1997) 10, 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Trading Techs. Int'l, Inc. v. eSpeed, Inc.,
750 F. Supp. 2d 962 (N.D. Ill. 2010) 13

United States ex rel. Negron v. New York,
434 F.2d 386 (2d Cir. 1970) 4

V-Formation, Inc. v. Benetton Grp. SpA,
No. 01 Civ. 610, 2003 WL 21403326
(S.D.N.Y. June 17, 2003) 13

Viacao Aerea Sao Paulo, S.A. v. Int'l Lease Fin. Corp.,
119 F.R.D. 435 (C.D. Cal. 1988) 10

W. Virginia Univ. Hosps., Inc. v. Casey,
499 U.S. 83 (1991) 19

Yu Cong Eng v. Trinidad,
271 U.S. 500 (1926) 8

Zayas v. Puerto Rico,
451 F. Supp. 2d 310 (D.P.R. 2006) 13

STATUTES

8 U.S.C. § 1555 20

26 U.S.C. § 44 19

28 U.S.C. § 530C 20

28 U.S.C. § 1254 1

28 U.S.C. § 1291 1

28 U.S.C. § 1332 1

28 U.S.C. § 1827 ..... 4, 5, 18

28 U.S.C. § 1828 ..... *passim*

28 U.S.C. § 1920 ..... *passim*

28 U.S.C. § 1923 2

28 U.S.C. § 2412 22

TABLE OF AUTHORITIES
(continued)

Page(s)

42 U.S.C. § 2991b-3 20

42 U.S.C. § 12103 19

Act of Feb. 26, 1853, 10 Stat. 168 3

Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040 (1978) 3

French Penal Code Law No. 80-538 16

RULE

Federal Rule of Civil Procedure 54 ..... 7, 8

OTHER AUTHORITIES

123 Cong. Rec. S37213 (Nov. 4, 1977) 20

124 Cong. Rec. S36685 (Oct. 13, 1978) 4

Cong. Globe, 32d Cong., 2d Sess. app. (1853) 3, 15

H.R. Rep. No. 95-1687 (1978) 4, 5, 21

Charles F. Hollis, III, *Perpetual Mistrial: The Impropriety of Transnational Human Rights Litigation in United States Courts*, 1 Santa Clara J. Int'l L. 1 (2003) 14

Restatement (Third) of the Foreign Relations Law of the United States (1987) 16

S. Rep. No. 95-569 (1978) 5

David P. Warner, *Bringing White Collar Criminals to Justice*, 11 U.S. Mex. L.J. 171 (2003) 15

Webster's Collegiate Dictionary 11th ed. (2003) 17

PETITION FOR A WRIT OF CERTIORARI

Kouichi Taniguchi respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's award of costs is reported at 633 F.3d 1218. Pet. App. 1a. In a separate, unpublished memorandum disposition the court of appeals affirmed the district court's entry of summary judgment in favor of Kan Pacific. Pet. App. 9a. The district court's decisions granting summary judgment for the defendant, Pet. App. 12a, granting in part the defendant's bill of costs, Pet. App. 19a, and denying plaintiff's motion objecting to costs, Pet. App. 23a, are unreported.

JURISDICTION

The district court had jurisdiction over Mr. Taniguchi's complaint pursuant to 28 U.S.C. § 1332, because Mr. Taniguchi is a citizen of Japan, defendant Kan Pacific is a Northern Mariana Islands corporation, and the amount in controversy exceeded $75,000. The United States Court of Appeals for the Ninth Circuit entered its opinion on March 8, 2011 and denied Mr. Taniguchi's petition for rehearing on May 11, 2011. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1920 of 28 U.S.C. provides:

> A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;
(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

STATEMENT

A. Statutory Background

Section 1920 of 28 U.S.C. is the latest in a series of statutes governing costs in federal civil lawsuits. These statutes were passed to "enumerate[] the costs that ordinarily may be taxed to a losing party" in federal litigation, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757 (1980), and to exclude from cost recoveries expenses incurred of types not listed there, *see Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987).

The first such statute was adopted in 1853, in order to eliminate the "great diversity in practice among the courts" at the time, and to prevent "losing litigants [from] being unfairly saddled with exorbitant fees." *Alyeska Pipeline Serv. Co. v.*

Wilderness Soc'y, 421 U.S. 240, 251 (1975).[1] An important impetus to this legislation was a perception that recoverable costs "ha[d] been swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they [we]re taxed." Cong. Globe, 32d Cong., 2d Sess. app. 207 (1853) (remarks of Sen. Bradbury).

The content of the 1853 Act remained substantially unchanged in the Revised Statutes of 1874 and the Judicial Code of 1911. *Alyeska Pipeline*, 421 U.S. at 255. The text was revised and updated in the Revised Code of 1948, which enacted 28 U.S.C. § 1920. While the language of the statute differs from the original 1853 law, the intervening changes did not involve "any apparent intent to change the controlling rules." 421 U.S. at 255.

In 1978, the Congress, in enacting "The Court Interpreters Act," Public Law 95-539, amended section 1920 to add subparagraph (6).[2] The Act's primary purpose was to (1) "establish a program to facilitate the use of . . . interpreters" in judicial

---

[1] The 1853 statute provided, in relevant part: "The bill of fees of the clerk, marshal, and attorneys, and the amount paid printers, and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trial in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court . . . ." Act of Feb. 26, 1853, 10 Stat. 168.

[2] The 1978 amendment added "the following new paragraph" to 28 U.S.C. § 1920: "(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." Court Interpreters Act, Pub. L. No. 95-539 § 7, 92 Stat. 2040 (1978).

proceedings instituted by the United States, 28 U.S.C. § 1827, and (2) further "establish a program for the provision of special interpretation services" in the federal courts to "provide a capacity for simultaneous interpretation services in multidefendant criminal actions and multidefendant civil actions," *id.* § 1828. In these respects, the legislation responded to court decisions which had pointed out the importance of in-court interpreters, and required the provision of interpretation services at government expense in criminal cases. *E.g., United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970); *see* H.R. Rep. No. 95-1687 (1978). The legislation's sponsor in the Senate explained that the Act served to "insure[] that all individuals in Federal proceedings will be provided with a certified interpreter if their primary language is not English or if they have a hearing impairment." 124 Cong. Rec. S36685 (Oct. 13, 1978) (remarks of Sen. DeConcini).

The Act also provides for an interpreter in judicial proceedings, including non-criminal cases, where a party or witness "(a) speaks only or primarily a language other than the English language," or "(b) suffers from a hearing impairment," and might therefore be inhibited from understanding "the proceedings or communicati[ng] with counsel or the presiding judicial officer," or from "comprehen[ding] . . . questions and the presentation of . . . testimony." 28 U.S.C. § 1827(d).

Section 1827 specifies the nature of the interpretation services required to be made available:

> The interpretation provided by certified or otherwise qualified interpreters pursuant to this

> section shall be in the simultaneous mode for any party to a judicial proceeding initiated by the United States and in the consecutive mode for witnesses . . . .

Id. at § 1827(k). "Simultaneous" interpretation refers to the act of "interpret[ing] and speak[ing] contemporaneously with the individual whose communication is being translated." H.R. Rep. No. 95-1687 (1978). "Consecutive" interpretation, by contrast, involves "the speaker, whose communication is being translated, . . . paus[ing] to allow the interpreter to convey the testimony given." *Id.* The statute also provides for the appointment of "sign language interpreter[s]" for the hearing impaired. 28 U.S.C. § 1827(l).

In addition to its extensive provisions defining the rights to interpreters in federal court proceedings, the Court Interpreters Act contains language which expanded the federal taxation of costs statute, 28 U.S.C. § 1920, to allow recovery as costs of "compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." 28 U.S.C. § 1920(6). The Act therefore provided that "[i]n civil actions, the costs incident to providing the services of an interpreter shall be paid by the parties in such proportion and at such time as the presiding judicial officer directs and may be taxed as costs in the action." S. Rep. No. 95-569 at 8 (1978).

B. Proceedings Below

Kouichi Taniguchi, a Japanese professional baseball player, was visiting the Marianas Resort and Spa in the Northern Mariana Islands when he fell through a wooden deck on its premises. Pet. App.

2a. Mr. Taniguchi brought this diversity lawsuit against the owner of the resort, Kan Pacific Saipan, Ltd., alleging negligence and seeking damages for losses he suffered as a result of the accident, including medical expenses and lost income. *Id.* During the course of the litigation, Kan Pacific incurred costs translating certain contracts and other documents from Japanese into English.

Following discovery, both parties moved for summary judgment. *Id.* The district court granted summary judgment for Kan Pacific in an unpublished opinion. *Id.* The district court also awarded costs to Kan Pacific. The district court's taxation of costs included Kan Pacific's document translation costs of $5,517.20, which the district court categorized as "compensation of interpreters" under section 1920(6). *Id.* at 21a-22a.

On petitioner's appeal, which addressed both the merits of the case and the award of costs, the Ninth Circuit affirmed the cost award in a published opinion. *Id.* at 1a-8a. The panel held that under section 1920(6), "the prevailing party should be awarded costs for services required to interpret either live speech or written documents into a familiar language, so long as interpretation of the items is necessary to the litigation." *Id.* at 7a.

The Ninth Circuit noted that "there is a circuit split concerning the statutory interpretation of § 1920(6)," and acknowledged the Seventh Circuit's decision in *Extra Equipamentos E Exportação Ltda. v. Case Corp.*, 541 F.3d 719, 727-28 (7th Cir. 2008), which "determined that 'interpretation' and 'translation' have distinct meanings" and "declined to award costs for translation services." Pet. App. 5a-

6a. But the Ninth Circuit aligned itself with the Sixth Circuit, which reached a contrary conclusion in *BTD Products, Inc. v. Lexmark Int'l, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005). The court explained that, while the "Seventh Circuit relied on what it thought to be the common understanding of an 'interpreter' as one who translates the spoken word rather than the written word," the Sixth Circuit "concluded that 'translation' services and 'interpretation' services are interchangeable." Pet. App. 6a-7a.

Following the reasoning of the Sixth Circuit, the court explained that "[i]n § 1920(6), the word 'interpreter' can reasonably encompass a 'translator,' both according to the dictionary definition and common usage of these terms, which does not always draw precise distinctions between foreign language interpretations involving live speech versus written documents." Pet. App. 7a. The court found this conclusion to be more compatible with Federal Rule of Civil Procedure 54, which it stated "includes a decided preference for the award of costs to the prevailing party." *Id.* Since "it was necessary for Kan Pacific to have Taniguchi's documents and medical records translated to adequately prepare its defense," the Ninth Circuit found that "the district court acted within its discretion when it determined that translation services were necessary to render pertinent documents intelligible to the litigants." *Id.* at 8a.

In a separate, unpublished memorandum disposition, the Ninth Circuit affirmed the district court's entry of summary judgment for Kan Pacific on the merits of the action. *Id.* at 9a. The Ninth Circuit

denied Mr. Taniguchi's petition for rehearing on May 11, 2011. *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL COURTS ARE SHARPLY DIVIDED OVER WHETHER TRANSLATORS OF A WRITTEN DOCUMENT ARE "INTERPRETERS" AS THAT WORD IS USED IN 28 U.S.C § 1920(6)

There is a clear split in the courts of appeals on the question whether the term "interpreters" in 28 U.S.C. § 1920(6) encompasses document translators. While the Ninth Circuit's decision in this case joins six other circuits in finding the statute to reach translators of documents, the Seventh Circuit has reached a contrary conclusion in a carefully reasoned opinion by Judge Posner, which forcefully demonstrates that the majority view is incorrect. Moreover, the significance of this circuit split is exacerbated by a deep and persistent division in the district courts, whose rulings on this issue are frequently not appealed.

1. In *Extra Equipamentos*, 541 F.3d 719, the Seventh Circuit reasoned that the statute authorizes taxation of "compensation of interpreters," and "[a]n interpreter as normally understood is a person who translates living speech from one language to another." *Id.* at 727. Conversely, "the translator of a document is not referred to as an interpreter." *Id.* (citing *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 508-09 (1926)). The court explained that the dictionary definition of "interpreter" ordinarily applies to those who translate spoken language. *See id.* And in natural speech, "[i]f a judge translated the French Code of Criminal Procedure into English, we would

not say that he had 'interpreted' the French code into English." *Id.* at 728.

The court also underscored the serious dangers of stretching section 1920 beyond its plain meaning, because "while there is a natural limit to the expense of interpreters—the amount of time that witnesses (including deponents) undergo live examination—there is no natural limit on the number of documents that can be translated in aid of a claim or defense." *Id.* In addition, the court noted that "[t]o include translation fees would simply complicate the process of awarding court costs." *Id.* "Was all that translation of written documents necessary? We do not think a district judge should be required to wade into such issues without a clearer directive from Congress." *Id.*

The Seventh Circuit reached this decision "mindful that the Sixth Circuit in *BDT Products, Inc. v. Lexmark Int'l, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005), [had] held that the statute allows the award of costs for translating documents." *Extra Equipamentos*, 541 F.3d at 728. Because this decision would "create[] a conflict with another circuit, [the panel] circulated the opinion . . . to the entire court," and "[n]o judge voted to hear the case en banc." *Id.*

2. The Sixth Circuit panel which had reached the opposite conclusion in *BDT Products*, reasoned that one dictionary definition of "interpret" is "to 'translate into intelligible or familiar language,'" with no reference or limitation as to the mode of communication. 405 F.3d at 419. The court also noted that there is some "case law holding that translation costs are taxable under § 1920." *Id.* (citing *Quy v. Air Am., Inc.*, 667 F.2d 1059, 1065-66

(D.C. Cir. 1981), and *Oetiker v. Jurid Werke, GmbH*, 104 F.R.D. 389, 393 (D.D.C. 1982)).

In addition to the Sixth Circuit, the First, Fifth, Eighth, D.C., and Federal Circuits have similarly held, albeit without significant analysis, that a federal court may tax translation costs under section 1920(6). *See Slagenweit v. Slagenweit*, 63 F.3d 719, 721 (8th Cir. 1995) (per curiam) (affirming award of translation costs where the appellant "ha[d] failed to demonstrate that costs for the translated documents were unnecessarily incurred"); *Chore-Time Equip., Inc. v. Cumberland Corp.*, 713 F.2d 774, 782 (Fed. Cir. 1983) ("The award of costs for translation of a German patent . . . was appropriate under 28 U.S.C. § 1920(6)."); *Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 713 F.2d 128, 133 (5th Cir. 1983) (affirming award of translation expenses as taxable costs); *In re Puerto Rico Elec. Power Auth.*, 687 F.2d 501, 510 (1st Cir. 1982) ("Whichever party ultimately prevails will at the conclusion of the case be free to apply to district court for reimbursement of its translation expenses as 'costs' . . . ."); *Quy*, 667 F.2d at 1065 (holding that under § 1920(6), "the District Court was authorized to award costs for the Vietnamese-to-English translations of plaintiffs' depositions introduced at trial").

3. In *Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471 (10th Cir. 1997), the Tenth Circuit indicated skepticism that section 1920(6) permits document translation costs by its citation of *Viacao Aerea Sao Paulo, S.A. v. Int'l Lease Fin. Corp.*, 119 F.R.D. 435, 440 (C.D. Cal. 1988), which held that the word "interpreter" includes only those who translate

spoken language. *See* 115 F.3d at 1479. The Tenth Circuit declined to decide the issue, however, because it had not been adequately preserved. *See id.*

4. The disuniformity in the federal courts is substantially more pronounced than might be indicated by a circuit split of 6-1, because the issue arises frequently, is rarely appealed in the great majority of routine cases where relatively small amounts are at stake, and thus is one on which the district courts are sharply at odds in the circuits which have yet to resolve the issue.

Thirty three years after enactment of this statute, there are still five circuits—the Second, Third, Fourth, Tenth and Eleventh—where no binding circuit authority has yet been developed.

In these latter circuits, "some courts . . . have followed the Seventh Circuit and disallowed translation costs, [and] others have allowed such costs," *Delaware Valley Floral Grp., Inc. v. Shaw Rose Nets, LLC*, No. 07-20199, 2009 WL 5127941, at *5 (S.D. Fla. Nov. 6, 2009), resulting in a real problem of unequal justice from the application of differential rules.[3] The "split in the authority [that]

---

[3] This problem is readily apparent from a review of district court decisions from the undecided circuits over just the last five years: *Compare* cases denying awards of translation costs: *Delaware Valley Floral Grp., Inc. v. Shaw Rose Nets, LLC*, 2009 WL 5127937, at *1 (S.D. Fla. Dec. 17, 2009); *Galvez v. Cuevas*, No. 08-80378, 2009 WL 1024632, at *6 (S.D. Fla. Apr. 15, 2009); *Tesler v. Costa Crociere S.p.A.*, No. 08-60323, 2009 WL 1851091, at *2 (S.D. Fla. June 29, 2009); *Ricoh Corp. v. Pitney Bowes, Inc.*, No. 02-5639, 2007 WL 1852553, at *2-3 (D.N.J. June 26, 2007) *with* cases allowing awards of translation costs: *Castillo v. Teledyne Cont'l Motors, Inc.*, No. 08-21850, 2011 WL 1343051, at *5 & n.16 (S.D. Fla. Mar. 16, 2011); *Osorio v. Dole Food Co.*, No. 07-22693, 2010 WL 3212065, at *10 (S.D. Fla.

exists among the circuits that have ruled on the matter," *Osorio v. Dole Food Co.*, No. 07-22693, 2010 WL 3212065, at *9 (S.D. Fla. July 7, 2010), is thus mirrored in the larger numbers of divergent cases where the trial court has the last word.

II. THIS CIRCUIT SPLIT INVOLVES AN ISSUE OF EXCEPTIONAL IMPORTANCE THAT WARRANTS REVIEW BY THIS COURT

The Court's guidance is urgently needed to resolve the question for several reasons.

1. Not surprisingly, given the multicultural and multi-lingual nature of our society, the need for interpretation and translation services is a rapidly expanding one. Thus, the district courts around the country are required to address it with great frequency.[4]

(continued...)

July 7, 2010); *Chacon v. El Milagro Care Ctr., Inc.*, No. 07-22835, 2010 WL 3023833, at *8 (S.D. Fla. July 29, 2010); *Merck Sharp & Dohme Pharms., SRL v. Teva Pharms. USA, Inc.*, No. 07-1596, 2010 WL 1381413, at *6 (D.N.J. Mar. 31, 2010); *Ortho-McNeil Pharm., Inc. v. Mylan Labs., Inc.*, No. 1:02CV32, 2008 WL 7384877, at *9-12 (N.D.W. Va. Aug. 18, 2008), *aff'd in part, vacated in part*, 569 F.3d 1353 (Fed. Cir. 2009); *Porcelanas Florencia, S.A. v. Caribbean Resort Suppliers, Inc.*, No. 06-22139, 2009 WL 1456338, at *8 (S.D. Fla. May 22, 2009); *S.R. Galves Participacao, Importacao & Exporticau Ltda. v. Natural Source Int'l Ltd.*, No. 06 Civ. 10182, 2007 WL 1484465, at *2 (S.D.N.Y. May 21, 2007).

[4] A representative sample of the large number of district court cases since 2000 confronting the issue of document translation costs include: *Castillo*, 2011 WL 1343051, at *5 & n.16; *Osorio*, 2010 WL 3212065, at *10; *Gabriel Techs. Corp. v. Qualcomm, Inc.*, No. 08CV1992, 2010 WL 3718848, at *12 (S.D. Cal. Sept. 20, 2010); *Chacon*, 2010 WL 3023833, at *8; *Maker's Mark*

The ongoing disunity in the federal courts on this costs issue is particularly problematic because it frustrates the primary purpose of the Congress in enacting the federal costs statute, which was to eliminate variability in the treatment of costs in

---

(continued...)

Distillery, Inc. v. Diageo N. Am., Inc., No. 3:03-CV-93-H, 2010 WL 2651186, at *3 (W.D. Ky. June 30, 2010); *Conn v. Zakharov*, No. 1:09 CV 0760, 2010 WL 2293133, at *3 (N.D. Ohio June 4, 2010); *Dong Ah Tire & Rubber Co. v. Glasforms, Inc.*, No. C06-3359JF, 2010 WL 1691869, at *7 (N.D. Cal. Apr. 23, 2010); *Hynix Semiconductor Inc. v. Rambus Inc.*, 697 F. Supp. 2d 1139, 1150 (N.D. Cal. 2010); *Merck Sharp*, 2010 WL 1381413, at *6; *Trading Techs. Int'l, Inc. v. eSpeed, Inc.*, 750 F. Supp. 2d 962, 982-83 (N.D. Ill. 2010); *Delaware Valley Floral*, 2009 WL 5127937, at *1; *Horizon Hobby, Inc. v. Ripmax Ltd.*, No. 07-CV-2133, 2009 WL 3381163, at *6 (C.D. Ill. Oct. 15, 2009); *Porcelanas Florencia*, 2009 WL 1456338, at *8; *Galvez*, 2009 WL 1024632, at *6; *Tesler*, 2009 WL 1851091, at *2; *Gidding v. Anderson*, No. C07-04755, 2008 WL 5068524, at *1 (N.D. Cal. Nov. 24, 2008); *Ortho-McNeil*, 2008 WL 7384877, at *9-12; *Ricoh*, 2007 WL 1852553, at *2-3; *S.R. Galves*, 2007 WL 1484465, at *2; *Competitive Techs. v. Fujitsu, Ltd.*, No. C-02-1673, 2006 WL 6338914 (N.D. Cal. Aug. 23, 2006); *Zayas v. Puerto Rico*, 451 F. Supp. 2d 310, 318 (D.P.R. 2006); *Tharo Systems, Inc. v. Cab Produkttechnik*, No. 1:03CV0419, 2005 WL 1123595, at *2 (N.D. Ohio 2005); *Dattner v. Conagra Foods, Inc.*, No. 01 Civ. 11297, 2005 WL 1963937, at *2-3 (S.D.N.Y. Aug. 16, 2005); *Aerotech Res., Inc. v. Dodson Aviation, Inc.*, 237 F.R.D. 659, 665 (D. Kan. 2005); *V-Formation, Inc. v. Benetton Grp. SpA*, No. 01 Civ. 610, 2003 WL 21403326, at *3 (S.D.N.Y. June 17, 2003); *Shimek v. Michael Weinig AG*, No. Civ. 99-2015, 2003 WL 328038 (D. Minn. Feb. 10, 2003); *Arboireau v. Adidas Salomon AG*, No. CV-01-105-ST, 2002 WL 31466564, at *6 (D.Or. June 14, 2002); *Shared Medical Sys. v. Ashford Presbytarian Cmty. Hosp.*, 212 F.R.D. 50, 55 (D.P.R. 2002); *Neles-Jamesbury, Inc. v. Fisher Controls Int'l, Inc.*, 140 F. Supp. 2d 104, 107 (D. Mass. 2001); *Pan Am. Grain Mfg. Co. v. Puerto Rico Ports Authority*, 193 F.R.D. 26, 38 (D.P.R. 2000).

federal litigation, and to achieve nationwide federal uniformity on costs issues. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 251 (discussing congressional purpose "to standardize the costs allowable in federal litigation"). This principle of uniformity has been the central governing principle of the congressional costs regime since the nineteenth century. *See Crawford Fitting Co.*, 482 U.S. at 440 ("The sweeping reforms of the 1853 Act have been carried forward to today, without any apparent intent to change the controlling rules." (internal quotation marks omitted)); *Alyeska Pipeline Serv. Co.*, 421 U.S. at 251-62. The ongoing, widespread divergence of the federal courts' treatment of translation costs thus thwarts the core purpose of the statute.

The deep divergence in the federal courts over the interpretation of section 1920(6) is most objectionable in those periodic cases in which translation gives rise to astronomical costs awards. In *Ortho-McNeil Pharmaceuticals, Inc. v. Mylan Laboratories, Inc.*, for example, the Federal Circuit affirmed the district court's award of more than $1 million in document translation costs. 569 F.3d 1353, 1356 (Fed. Cir. 2009).

The expense of translation in *Ortho-McNeil*, while not the rule, was not an isolated anomaly. In certain cases, "[t]ranslators may charge exorbitant amounts for their services," Charles F. Hollis, III, *Perpetual Mistrial: The Impropriety of Transnational Human Rights Litigation in United States Courts*, 1 Santa Clara J. Int'l L. 1 n.92 (2003), and the costs of translation can impose an "immense burden" on the parties in litigation. *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 608 (D.C. Cir.

1983); *see also, e.g.*, *Dahl v. United Techs. Corp.*, 632 F.2d 1027, 1031 (3d Cir. 1980) (noting that "[t]he major practical problem in this case is the translation of documents"); *In re Top Tankers Inc., Secs. Litig.*, No. 06 Civ. 13761, 2008 WL 2944620, at *6 (S.D.N.Y. July 31, 2008) (noting, in approving a settlement, that "[t]he cost of litigating this case would have been exorbitant—the translation costs alone would have approximated the settlement amount" of $1,200,000); David P. Warner, *Bringing White Collar Criminals to Justice*, 11 U.S. Mex. L.J. 171, 176 & n.42 (2003) (noting that "scores of documents, particularly financial statements, can generate exorbitant translation fees").

The Seventh Circuit noted this danger in *Extra Equipamentos*, observing that "[a] suit of the magnitude of Extra's suit . . . can generate millions of pages of documents" whose translation would be extraordinarily costly. 541 F.3d at 728. And because an overriding purpose of the costs statute is to eliminate the danger of "oppressive" and "disproportionate" costs awards, Cong. Globe, 32d Cong., 2d Sess. app. 207 (remarks of Sen. Bradbury), the disparate application of section 1920(6) will, if left unreviewed, undermine the purposes animating the statute in this respect as well.

2. The question whether costs may be imposed for translating documents also implicates important issues of international relations and foreign comity that have been the subject of ongoing and vigorous concern in the international community. "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents

in investigation and litigation in the United States." Restatement (Third) of the Foreign Relations Law of the United States § 442 Reporter's Note 1 (1987). A number of foreign nations have expressed concern about subjecting their citizens to the expense and burden of complying with expansive U.S. document discovery, sometimes even implementing "blocking statutes" designed to restrict or prohibit compliance with such discovery obligations within their borders. *See, e.g.*, French Penal Code Law No. 80-538 (quoted in translation, *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 526 n.6 (1987)).

In the face of such international disagreement, this Court has emphasized that "the demands of comity" require that "American courts should . . . take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state." *Societe Nationale*, 482 U.S. at 546. In particular, this Court counseled "special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position," and instructed that United States courts "should always seek to minimize [the] costs and inconvenience" associated with such discovery. *Id.*

The Ninth Circuit's allowance of document translation expenses as costs threatens further to magnify the already extensive discovery expenses of foreign nationals that trigger such "special vigilance." *Id.* Under the costs rule endorsed by the Ninth Circuit and the other circuits it joined, foreign

litigants involved in litigation in United States courts would not only be subjected to extensive U.S. discovery obligations, but could then be liable for potentially exorbitant costs associated with translating the numerous foreign-language documents that are involved—many of which are those they had been required to produce in the first place. Such large additional expenses are precisely the sort of "burdensome" obligation requiring "due respect" for the interest of foreign sovereigns who have objected to having their nationals subjected to expansive and costly U.S. discovery obligations.

III. THE DECISION BELOW IS WRONG ON THE MERITS

A. The Text and Structure of Section 1920(6) Foreclose Application to Document Translators

1. Section 1920(6) provides that a court may tax costs, including "compensation for interpreters." An "interpreter" is "one who translates orally for parties conversing in different languages." Webster's Collegiate Dictionary 11th ed. (2003). This limitation to spoken communication is no mere definitional subtlety; it goes to the heart of the word's ordinary meaning. "Robert Fagles made famous translations into English of the *Iliad*, the *Odyssey*, and the *Aeneid*, but no one would refer to him as an English-language 'interpreter' of these works." *Extra Equipamentos*, 541 F.3d at 727.

The other provisions of the Court Interpreters Act, which created section 1920(6), make clear that the textual limitation to "interpreters" comports with the congressional purpose. The Congress enacted this provision as a small part of legislation focused on

providing in-court interpretation services. *See* 28 U.S.C. §§ 1827, 1828. This cost-shifting provision addressed the same subject and thus did not encompass compensation for document translation. It would be particularly unwarranted to adopt an expansive, atextual reading of section 1920(6) as encompassing document translators when document translation plainly had no role in the substantive provisions of the statute for which subsection (6) was created as a costs analogue.

This meaning is further confirmed by the separate occurrence of another cognate of the word "interpreter" within section 1920(6). In addition to listing "compensation of interpreters," section 1920(6) enumerates "special interpretation services under section 1828 of this title." Yet there can be no question that the "special interpretation services" in question are limited to the translation of spoken proceedings. Section 1828 makes this unmistakably clear, as it expressly provides for "*simultaneous* interpretation services in multidefendant criminal actions and multidefendant civil actions." 28 U.S.C. § 1828(a) (emphasis added). Because section 1920(6) includes a second use of "interpretation" that is unambiguously limited to spoken proceedings, Congress's use of the same term in the same section presumptively carries the same meaning. *See, e.g.*, *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted)). This presumption is particularly strong because the two related terms bear an "interrelationship and close

proximity" in the statutory text. *Comm'r of Internal Revenue v. Lundy*, 516 U.S. 235, 250 (1996)

2. The restriction of "interpreters" to those who translate spoken language is also part of a broader congressional convention applied throughout the United States Code. Throughout the Code, the Congress has drawn distinctions between "interpreters" and "translators," and has used both terms together where it chooses to include both spoken and written translation. Such consistent patterns of congressional usage are particularly strong evidence of meaning. *See, e.g., Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 129-30 (1995) (where "the United States Code displays throughout" a consistent meaning of a term, that meaning is presumptively applicable); *W. Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88-92 (1991) (consistent "statutory usage shows beyond question" the meaning of a statutory term).

For example, several provisions of the United States Code explain that "interpreters" are understood to serve the function of "mak[ing] aurally delivered materials available to individuals with hearing impairments." 26 U.S.C. § 44(c)(2)(B); 42 U.S.C. § 12103 (defining "auxiliary aids and service" to include "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments"). This definition obviously excludes document translation, which does not involve "aurally delivered" content and has nothing to do with assisting the "hearing impair[ed]."

Further, Congress routinely includes an affirmative reference to "translators" where it legislates regarding the translation of written documents, a formulation that would be surplusage if "interpreters" alone included the translation of written materials. *See, e.g.*, 8 U.S.C. § 1555(b) (specifying that INS appropriations "shall be available for payment of . . . interpreters or translators who are not citizens of the United States"); 28 U.S.C. § 530C(b)(1)(I) (providing that funds may be used for the "[p]ayment of interpreters or translators who are not citizens of the United States"); 42 U.S.C. § 2991b-3 (specifying that grants may be used for "the establishment of a project to train Native Americans to teach a Native American language to others or to enable them to serve as interpreters or translators of such language"). The Ninth Circuit's construction of "interpreters" as encompassing "translators" collapses this consistent congressional distinction.

B. The Legislative History Confirms The Limitation to Spoken Interpretation

The text and structure of the statute leave no doubt that the term "interpreters" means only those who engage in the interpretation of spoken proceedings. Were the Court nonetheless to consider the legislative history relevant, it reinforces this conclusion.

In 1977, the legislation that would become the Court Interpreters Act was introduced "to provide more effectively for bilingual proceedings in all district courts of the United States." 123 Cong. Rec. S37213 (Nov. 4, 1977). The House and Senate both passed the Senate version of the Act in October 1978.

During the legislative process, the House Judiciary Committee compiled a detailed report on the Act. That report states that the legislation meant to authorize the appointment of an "interpreter" in some circumstances when an individual "speaks" a language other than English or "suffers from a hearing impairment." H.R. Rep. No. 95-1687. The congressional understanding that the statute would involve only the interpretation of spoken proceedings is further confirmed by the fact that the legislators expressed concern for accommodating the hearing impaired through interpretation services, but not the visually impaired, through, *e.g.*, provision for Braille rendition of documents. This disparity between the hearing impaired and the vision impaired makes perfect sense if the Congress understood the statute to apply to spoken proceedings (which the blind can hear and understand) but not to written documents.

In addition, the House Report specifies that "[i]t is the committee's intent that all interpretations are to be made in the consecutive mode," which refers to "the speaker whose communication is being translated" pausing "to allow the interpreter to convey the testimony given." *Id.* The other two modes of interpretation discussed in the report—"simultaneous" and "summary"—require the interpreter, respectively, to either "speak contemporaneously" with the translated speech or to "condense and distill the speech" of the speaker. All of these three methods exclusively involve the live translation of vocalized speech. By contrast, there is no hint in the legislative history that the use of the word "interpreters" in section 1920(6) would have a different meaning than in the substantive provisions of the statute.

Accordingly, the legislative history amply confirms what is already clear from the plain meaning of the statutory text: Section 1920(6) has no application to the translation of written documents.

C. Any Ambiguity Should Be Resolved Against Extending The Term "Interpreters" To Include One Who Translates Written Documents

Were there any ambiguity on the issue of the provision's applicability to document translation—and petitioner submits that there is none—it would necessarily be resolved against such inclusion. This is so for three reasons.

First, the Ninth Circuit's reading expansively construes a waiver of sovereign immunity. Section 2412(a)(1) of 28 U.S.C. provides that, as a general matter, "costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action." Thus, if document-translation costs are allowed under section 1920, they may be assessed against the government. *See, e.g.*, *Flores-Torres v. Holder*, Nos. C08-01037, C09-03569, 2010 WL 1910011, at *2-3 (N.D. Cal. May 11, 2010) (awarding document translation costs against the United States). Such cost-shifting, like fee-shifting, "amounts to a partial waiver of sovereign immunity" and "must be strictly construed in favor of the United States." *Ardestani v. I.N.S.*, 502 U.S. 129, 137 (1991).

Second, the Ninth Circuit's reading is disfavored because it expansively construes a statute in derogation of the common law. The "American Rule" requiring that each party in a civil action bear its own costs and fees finds its roots in the common law. "[C]osts were not allowed" at common law. *Alyeska Pipeline*, 421 U.S. at 247. As such, cost and fee-shifting statutes are in derogation of the common law and must be narrowly construed. *See, e.g., Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35 (1983) ("It is a well-established principle of statutory construction that the common law ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose." (internal quotation marks, brackets, and ellipsis omitted)); *Lockett v. Hellenic Sea Transports, Ltd.*, 60 F.R.D. 469, 473 (E.D. Pa. 1973) (construing section 1920 narrowly as a statute in derogation of the common law).

Third, as shown above, *see supra* at 15-17, the Ninth Circuit's expansive reading of section 1920(6) raises significant issues of international comity that should be avoided in the event of statutory ambiguity. "[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). "This rule of construction reflects principles of customary international law — law that (we must assume) Congress ordinarily seeks to follow." *Id.* For the reasons shown above, construing section 1920(6) to authorize costs awards of document translation expenses would substantially aggravate longstanding concerns over the burden and scope of United States

discovery obligations in transnational litigation. As such, that interpretation should be avoided in the event of ambiguity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DOUGLAS F. CUSHNIE
P.O. BOX 500949
SAIPAN, MP 96950
(670) 234-6843

DONALD B. AYER
Counsel of Record
MICHAEL S. FRIED
CHRISTOPHER J. SMITH
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
dbayer@jonesday.com
(202) 879-3939
Counsel for Petitioner

June 3, 2011

APPENDIX

APPENDIX A

United States Court of Appeals,
Ninth Circuit.
Kouichi TANIGUCHI, Plaintiff–Appellant,
v.
KAN PACIFIC SAIPAN, LTD., doing business as Marianas Resort and Spa, Defendant–Appellee.

No. 09–15212.
Argued and Submitted Oct. 14, 2010.
Filed March 8, 2011.

Douglas F. Cushnie, Saipan, MP, for the plaintiff-appellant.

Richard W. Pierce (argued), Law Office of Richard W. Pierce, Saipan, MP, and Thomas Lynn Roberts (briefed), Dooley, Roberts & Fowler, Tamuning, Guam, for the defendant-appellee.

Appeal from the United States District Court for the District of the Northern Mariana Islands, Alex R. Munson, Chief District Judge, Presiding. D.C. No. 1:08–cv–00008.

Before: MICHAEL DALY HAWKINS, M. MARGARET McKEOWN and JOHNNIE B. RAWLINSON, Circuit Judges.

OPINION

RAWLINSON, Circuit Judge:

Appellant Kouichi Taniguchi (Taniguchi) instituted this action against Kan Pacific Saipan, Ltd. (Kan Pacific) after he fell through a deck on Kan Pacific's premises. Following a grant of summary judgment in favor of Kan Pacific, the district court awarded costs to Kan Pacific for translation services incurred in the course of the litigation. Taniguchi appeals this award of costs.[1] We have jurisdiction under 28 U.S.C. § 1291 and affirm the district court's ruling.

I. BACKGROUND

During a tour of property owned by Kan Pacific, Taniguchi, a professional baseball player in Japan, fell through a wooden deck. Immediately after the accident, Taniguchi stated that he did not need medical attention.

Two weeks after the incident, Taniguchi informed Kan Pacific that he had sustained various cuts, bruises, and torn ligaments from the fall. As a result of these injuries, Taniguchi allegedly incurred various medical, hospital, and rehabilitative expenses and was compelled to cancel contractual obligations, resulting in a loss of income.

Taniguchi subsequently filed a negligence action against Kan Pacific. Following discovery, both parties moved for summary judgment. The district court granted Kan Pacific's motion. The district court also awarded costs to Kan Pacific, including the costs

---

[1] Taniguchi's challenge to the entry of summary judgment in favor of Kan Pacific on the merits of the action, and other issues raised by Taniguchi on appeal are resolved in a separate memorandum disposition filed contemporaneously with this opinion.

of translating contracts and other documents from Japanese to English. Taniguchi filed a timely notice of appeal.

II. STANDARD OF REVIEW

We review an award of costs for an abuse of discretion. *See Sea Coast Foods, Inc. v. Lu–Mar Lobster and Shrimp, Inc.*, 260 F.3d 1054, 1058 (9th Cir. 2001), *as amended.* Whether the district court has the authority to award costs is a question of law reviewed *de novo. Rouse v. Law Offices of Rory Clark*, 603 F.3d 699, 702 (9th Cir. 2010).

III. DISCUSSION

A. Kan Pacific's Entitlement To Costs

Taniguchi contends that the district court erred by awarding costs to Kan Pacific, because Kan Pacific's insurance company assumed responsibility for all costs incurred by Kan Pacific during the litigation. Taniguchi relies on *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 380, 70 S.Ct. 207, 94 L.Ed. 171 (1949), for the proposition that the case must be "prosecuted in the name of the real party in interest." Fed.R.Civ.P. 17(a). However, that case is not persuasive because it addressed a situation where the insurance company satisfied the insured's claim and then sued the tortfeasor as the insured's successor-in-interest. *See id.* at 368, 70 S.Ct. 207. A question was raised regarding whether the insurance company could bring the action in its own name rather than in the name of the insured. *See id.* The United States Supreme Court ruled that an insurer who "has paid an entire loss suffered by the insured, . . . is the only real party in interest . . ." *Id.* at 380–81, 70 S.Ct. 207 (citation omitted). There is no analogous situation in this case.

Similarly, in *Hilbrands v. Far East Trading Company, Inc.*, 509 F.2d 1321, 1322–23 (9th Cir. 1975), we held that the case must be prosecuted in the name of the real party in interest. However, that case also involved a claim paid to the injured party by the insurance company and a question as to whether the case could be prosecuted by the insurance company who paid the benefits. *See id.* at 1322. The same analysis does not apply to a defendant whose defense costs are paid by its insurer. Unlike an insured whose claim has been fully satisfied, the defendant who remains liable for any money damages awarded to the plaintiff is still very much an interested party. *See, e.g., Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 639–40 (11th Cir. 1991) (permitting the recovery of costs paid by an insurer). If we were to adopt Taniguchi's suggested analysis, a plaintiff could file lawsuits against an insured defendant "without incurring litigation costs after losing on the merits." *Id.* at 639. In essence, Taniguchi's reasoning punishes a prevailing party for being insured and violates the provisions and intent of Rule 54(d) of the Federal Rules of Civil Procedure, which directs the award of costs to a prevailing party. Thus, we hold that Kan Pacific was entitled to seek an award of costs even though the cost of litigation was paid by its insurer.

B. The Award of Translation Costs

Taniguchi contends that the district court erred in awarding costs for translation services used by Kan Pacific during the litigation. Taniguchi cites to 28 U.S.C. §§ 1827[2] and 1828[3] to support his argument.

---

[2] 28 U.S.C. § 1827(a) provides: The Director of the Administrative Office of the United States Courts shall

However, Taniguchi's reliance on 28 U.S.C. §§ 1827 and 1828 is unavailing because the district court judge awarded costs for translation fees pursuant to 28 U.S.C. § 1920(6).[4] Under § 1920(6), the district court has discretion to award fees for the compensation of interpreters in addition to the costs of "special interpretation services under section 1828 . . ." *Id.*

As recognized by the parties, there is a circuit split concerning the statutory interpretation of § 1920(6). The Seventh Circuit has determined that

---

establish a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States.

[3] 28 U.S.C. § 1828(a) provides: The Director of the Administrative Office of the United States Courts shall establish a program for the provision of special interpretation services in criminal actions and in civil actions initiated by the United States (including petitions for writs of habeas corpus initiated in the name of the United States by relators) in a United States district court. The program shall provide a capacity for simultaneous interpretation services in multidefendant criminal actions and multidefendant civil actions.

[4] 28 U.S.C. § 1920 provides: A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;
(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
(5) Docket fees under *section 1923* of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under *section 1828* of this title.

"interpretation" and "translation" have distinct meanings and has declined to award costs for translation services. *See Extra Equipamentos E Exportação Ltda. v. Case Corp.*, 541 F.3d 719, 727–28 (7th Cir. 2008). The Seventh Circuit described "[t]he specificity of section 1920(6), and the character of section 1920 as a whole" to explain its expressed reluctance to include translators of written documents within the definition of interpreters. *Id.* at 727. The Seventh Circuit relied on what it thought to be the common understanding of an "interpreter" as one who translates the spoken word rather than the written word. *See id.*

The Seventh Circuit acknowledged that the dictionary definition of "interpreter" could conceivably encompass "interpretation ... of a document." *Id.* at 728. However, the court was of the view that including translation of written documents within the definition would stretch the language of § 1920 too far. *See id.* Having drawn that line, the Seventh Circuit denied the award of translation fees.

In contrast, the Sixth Circuit reasoned that courts have the authority to "interpret the meaning of items listed in § 1920(6)," and thus, awarding costs for translation of documents necessary for litigation is appropriate. *BDT Products, Inc. v. Lexmark Int'l, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005). The Sixth Circuit relied on a dictionary definition of interpret, which included "to translate into intelligible or familiar language." *Id.* (citation and internal quotation marks omitted). In essence, the Sixth Circuit concluded that "translation" services and "interpretation" services are interchangeable. *See also Quy v. Air America Inc.*, 667 F.2d 1059, 1065

(D.C. Cir. 1981) (holding that a cost award for translation of Vietnamese deposition testimony to English was "explicitly authorized by 28 U.S.C. § 1920(6)").

We are persuaded by the Sixth Circuit's reasoning. District courts are free to interpret the meaning of the cast of categories listed within § 1920. *See Alflex Corp. v. Underwriters Laboratories, Inc.*, 914 F.2d 175, 177–78 (9th Cir. 1990). In § 1920(6), the word "interpreter" can reasonably encompass a "translator," both according to the dictionary definition and common usage of these terms, which does not always draw precise distinctions between foreign language interpretations involving live speech versus written documents. More importantly, the Sixth Circuit's analysis is more compatible with Rule 54 of the Federal Rules of Civil Procedure, which includes a decided preference for the award of costs to the prevailing party. *See* Fed.R.Civ.P. 54(d) (providing that absent a federal statute, rule or court order to the contrary, costs "should be allowed to the prevailing party"); *see also Quy,* 667 F.2d at 1065–66 (concluding that translation of deposition testimony was necessary). We therefore agree with the Sixth and D.C. Circuits that within the meaning of § 1920(6), the prevailing party should be awarded costs for services required to interpret either live speech or written documents into a familiar language, so long as interpretation of the items is necessary to the litigation.

As Taniguchi alleged that his injuries caused him to lose compensation from his negotiated contract deals, it was necessary for Kan Pacific to have Taniguchi's documents and medical records

translated to adequately prepare its defense. Because we conclude that § 1920(6) contemplates the award of costs for translation services, we hold that the district court acted within its discretion when it determined that translation services were necessary to render pertinent documents intelligible to the litigants. *See Haagen–Dazs Co., Inc. v. Double Rainbow Gourmet Ice Creams, Inc.*, 920 F.2d 587, 588 (9th Cir. 1990) (stating that district courts have discretion to determine what costs should be awarded).

IV. CONCLUSION

The district court acted within its discretion when it awarded costs to Kan Pacific for expenses incurred to translate relevant documents.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KOUICHI TANIGUCHI, Plaintiff - Appellant, v. KAN PACIFIC SAIPAN, LTD., doing business as Marianas Resort and Spa, Defendant - Appellee.	No. 09-15212 D.C. No. 1:08-cv-00008 MEMORANDUM*

FILED

MAR 08 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the District of the Northern Mariana Islands
Alex R. Munson, Chief District Judge, Presiding

Argued and Submitted October 14, 2010
Honolulu, Hawaii

Before: HAWKINS, McKEOWN and RAWLINSON, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appellant Kouichi Taniguchi (Taniguchi) fell through a deck on Kan Pacific Saipan, Ltd.'s (Kan Pacific) premises. Taniguchi challenges the district court's grant of summary judgment in favor of Kan Pacific. Taniguchi also challenges the Taniguchi's challenge to the district court's failure to apply *res ipsa loquitur* and to consider Ken Pacific's alleged spoilation of evidence[1].

1. Taniguchi contends that the district court erred in granting summary judgment in favor of Kan Pacific. We review *de novo* entry of summary judgment with all reasonable inferences viewed in the light most favorable to the nonmoving party. *See Villiarimo v. Ahoha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). We then decide if any genuine issue of material fact exists, and if the district court "correctly applied the relevant substantive law." *Id.* (citation omitted). To avoid summary judgment, a party must provide evidence, going beyond the pleadings and mere assertions, with specific facts to establish a genuine issue of material fact. *See Far Out Productions, Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001).

Taniguchi did not provide sufficient evidence to raise a material issue of fact in view of the declaration of Kan Pacific's agent regarding Kan Pacific's lack of negligence. Therefore, we affirm the district court's decision granting summary judgment in favor of Kan Pacific. *Id.*

---

[1] Taniguchi's challenge to the district court's award of costs to Kan Pacific is resolved in a separate opinion filed contemporaneously with this disposition.

2. Taniguchi contends that the district court should have addressed the issue of whether Kan Pacific engaged in spoilation of evidence, which was raised in a motion for sanctions. However, the district court dismissed all pending motions as moot after granting summary judgment in favor of Kan Pacific. We have held that a district court has discretion to declare pending motions moot when a party cannot "provide any basis or factual support for his assertions . . ." *Margolis v. Ryan*, 140 F.3d 850, 854 (9th Cir. 1998). In this case, Taniguchi cannot "provide any basis or factual support for his assertions," *id.*, because Kan Pacific destroyed the damaged wood from the deck in the ordinary course of business. *See United States v. $40,955.00 in United States Currency*, 554 F.3d 752, 758 (9th Cir. 2009) (explaining that no spoilation occurs when the accused party destroys or disposes of evidence in the ordinary course of business).

3. Taniguchi contends that the district court did not consider the doctrine of *res ipsa loquitur* when ruling on the summary judgment motion and that he was entitled to have a *res ipsa loquitur* charge given to the jury. However, Taniguchi did not advance this theory in the district court.

We generally will not review an issue initially raised on appeal. *See United States v. Castro*, 887 F.2d 988, 996 (9th Cir. 1989). Neither will we re-frame the cause of action and essentially review a different cause of action than that decided by the district court. *See Robb v. Bethel School Dist. #403*, 308 F.3d 1047, 1052 n.4 (9th Cir. 2002).

AFFIRMED.

APPENDIX C

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

KOICHI TANIGUCHI, Plaintiff, v. KAN PACIFIC SAIPAN, LTD., dba MARIANA RESORT AND SPA, Defendant.	Civil Case No. 08-0008 **ORDER GRANTING DEFENDANT'S MOTION FOR CROSS-SUMMARY JUDGMENT**

THIS MATTER came before the Court on Thursday, December 18, 2008 at 9:00 a.m., for hearing of the following motions: (1) Plaintiff Koichi Taniguchi's Motion for Partial Summary Judgment and Defendant Kan Pacific Saipan, Ltd.'s Cross-Motion for Summary Judgment; (2) Plaintiff's Motion for Sanctions; (3) Plaintiff's Motion to Submit a Late Filed Declaration; (4) Defendant's Motion to Dismiss or in the Alternative Motion for Partial Summary Judgment or in the Alternative Motion In Limine; and (5) Defendant's Motion for Summary Judgment on Punitive Damages. Defendant appeared through its attorneys Tim Roberts and Richard W. Pierce. Plaintiff appeared through his attorney Douglas F. Cushnie. Having carefully reviewed the parties' briefs and the relevant legal authority, and having had the benefit of oral argument and good cause appearing, the Court hereby GRANTS Defendant's Cross-Motion for Summary Judgment.

BACKGROUND

This case arises out of a personal injury. On November 6, 2006, Plaintiff Koichi Taniguchi was taken on a tour of the grounds of the Mariana Resort & Spa ("Defendant"). (Taniguchi Depo. at 2.) A piece of a wooden deck broke beneath Mr. Taniguchi and his leg fell through the resulting hole. Following the accident, Mr. Taniguchi said he was fine and that he did not need to go to the doctor. (Opp. to Plaintiffs Motion for Sanctions, Watanabe Decl. ("Dec. 9, 2008 Watanabe Decl.") ¶ 2.) Mr. Taniguchi returned to Saipan on November 21, 2006 and informed Defendant that the fall had caused him to incur medical costs and miss three days of work. (Id. ¶ 3.) On February 11, 2008, Mr. Taniguchi filed suit in this Court alleging that he suffered "various cuts, bruises, and ligament tears" which caused him to incur medical costs and a loss of income. (Comp. ¶¶ 5, 8.) The complaint does not assert any causes of action. The Court will discuss additional specific facts as required in the analysis.

ANALYSIS

A. Motion for Summary Judgment Legal Standard.

Plaintiff moves for summary judgment on the issue of liability and Defendant cross moves on the same issue. Pursuant to Federal Rule of Civil Procedure 56(c), a moving party is entitled to a judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . . ." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of establishing that there is no genuine

issue of material fact, "that is, pointing out to the district court []that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Only where the moving party meets its burden of establishing that there is an absence of evidence to support the nonmoving party's case does the burden shift to the nonmoving party to present more than a scintilla of evidence in support of its position. Fed. R. Civ. P. 56(e) (once the moving party has met its burden, the opposing party "must set forth specific facts showing that there is a genuine issue for trial"); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] ruling on a motion for summary judgment . . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

B. Defendant's Are Not Liable As a Matter of Law.

The instant motions for summary judgment derive from Plaintiffs allegation that Defendant is liable for Plaintiffs injuries because Defendant failed to protect its business invitee from a dangerous condition on its land. The Restatement Second of Torts provides that: "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger or will fail to protect themselves against it, and (c) fails to exercise

reasonable care to protect them against danger."[1] Restatement 2d of Torts § 343. "An invitee is either a public invitee or a business visitor. . . . A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." *Id.* § 332.

Here, it is undisputed that Plaintiff was an invitee at Defendant's resort. The alleged dangerous condition on Defendant's land was the weakened deck. There is no evidence of what actually caused the deck to break. However, even if the Court assumed that there was a dangerous condition, there is also no evidence before the Court that Defendant reasonably should have known of the dangerous condition or that it failed to exercise reasonable care to protect Plaintiff against the danger. Plaintiff seemingly relies on the undisputed fact that the break happened as evidence of the unreasonable condition and Defendant's failure to adequately protect Plaintiff. The Court cannot rely on allegations alone to find Defendant liable for Mr. Taniguchi's injury as a matter of law. Accordingly, Plaintiff has failed to fulfill his initial burden under Rule 56 and Plaintiff's motion for partial summary judgment is DENIED.

Next, Defendant moved for cross-summary judgment on the issue of liability. Defendant

---

[1] In the Commonwealth of the Northern Mariana Islands, "the rules of the common law as expressed in the Restatements of the law as approved by the American Law Institute serve as the applicable rules of decision, in the absence of written or local customary law to the contrary." *Ito v. Macro Energy, Inc.*, 1993 WL 614805, at *7 (N.M.I. Oct. 26, 1993).

concedes that the deck broke underneath Plaintiff's footing and similarly cannot produce evidence of the reason for the break. However, Defendant does present evidence that it exercised reasonable care prior to the accident and never discovered the condition. First, Defendant inspected the deck at weekly intervals and never found any unsafe conditions on the deck. (Watanabe Decl. ¶ 2.) In addition, the entire deck was painted every six months and no defects or dangerous conditions were ever discovered during the painting. *(Id.* ¶ 3.) Moreover, no complaint had ever been made about any unsafe condition on the deck. *(Id.* 4-5.) As such, Defendant argues that it cannot be liable for Plaintiff's injury because, even assuming that there was a dangerous condition, Defendant exercised reasonable care and never discovered the dangerous condition. Since Defendant did not discover the condition, it could not have realized that the condition posed a risk of harm to its invitees and could not have known that their invitees required protecting from the danger. The evidence fulfills Defendant's initial burden to demonstrate to the Court that there is an absence of evidence to support Plaintiff's case.

In response, Plaintiff offers no evidence to create a genuine issue of material fact that Defendant should have known of the condition or that it failed to adequately protect him. Rather, Plaintiff relies on its assertion that Defendant destroyed the evidence of the broken deck and Plaintiff has therefore been unable to determine the cause of the break. However, even assuming that there was a dangerous condition, Plaintiff failed to present *any* evidence to refute Defendant's assertion that it exercised

reasonable care prior to the break and therefore could not have known of the dangerous condition. Once Defendant fulfilled its initial burden under Rule 56, the burden shifted to Plaintiff to present more than a scintilla of evidence in support of its position. Fed. R. Civ. P. 56(e) (once the moving party has met its burden, the opposing party "must set forth specific facts showing that there is a genuine issue for trial"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Here, Plaintiff failed to set forth any facts to create a genuine issue of material fact regarding Defendant's exercise of reasonable care. Accordingly, Plaintiff failed to fulfill his burden to create a genuine issue for trial and Defendant's Cross-Motion for Summary Judgment is GRANTED.[2]

CONCLUSION

In sum, the Court finds that based on the evidence before it there is no genuine issue of material fact that Defendant was not negligent. Accordingly, Plaintiff's Motion for Partial Summary Judgment is DENIED and Defendant's Cross-Motion for Summary Judgment is GRANTED.

---

[2] There are four additional motions before the Court. However, the Court's ruling on the Summary Judgment motions are dispositive and the Court will not address the remaining motions as they are now moot.

IT IS SO ORDERED.

Dated: December 22,2008

/s/ Alex R. Munson
ALEX R. MUNSON
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

KOUICHI TANIGUCHI,	)	Civil No. 08-0008
	)	
Plaintiff	)	
	)	ORDER RE-OPENING CASE
v.	)	FILE and GRANTING
KAN PACIFIC SAIPAN,	)	IN PART AND
LTD., doing business as	)	DENYING IN PART
Mariana Resort and Spa,	)	DEFENDANT'S BILL
	)	OF COSTS
	)	
Defendant	)	
	)	
	)	

IT IS ORDERED that this file be re-opened for purposes of considering defendant's bill of costs and for entry of judgment on a separate document.

Title 28, U.S.C. § 1920 delimits the costs available to a prevailing party. The rule in its entirety states:

> Taxation of costs. A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;

> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the trial;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828[1] of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

This court is constrained in the awarding of costs by the decision of the United States Supreme Court in *Crawford Fitting Company v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494 (1987). There, the Court, in refusing to accept the argument that § 1920 does not preclude taxation of costs above and beyond the items listed, stated that the discretion to award costs afforded judges by Fed.R.Civ.P. 54(d) is limited by the specific terms of 28 U.S.C. § 1920: "Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d). * * * It is phrased permissively

---

[1] The special interpretation services provided in 28 U.S.C. § 1828 have no application in this matter.

because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of a prevailing party."

Given the foregoing, the court awards or disallows defendant's claimed costs as follows:

Court Reporter Fees - 28 U.S.C. § 1920(2)

Deposition transcripts are taxable costs under § 1920(2). *Evanow v. M/V Neptune*, 163 F.3d 1108, 1118 (9th Cir. 1998). The court awards defendant $2,215.00 for the two depositions of plaintiff.

Travel and Subsistence - 28 U.S.C. § 1821

A $40 per day attendance fee is recoverable for witnesses, as are travel by the most economical means, and daily subsistence. However, and as compelling as the court finds Mr. Roberts' rationale for him traveling to Japan rather than Mr. Yamazaki traveling to Guam or Saipan, the fact remains that travel, lodging, meals, ground transportation, parking, and related expenses for the attorneys, their staff, or the client are not recoverable costs under either § 1821 or § 1920. Mr. Roberts' expenses incurred for travel to Kyoto are not recoverable and the claim for $1,467.52 must be disallowed.

Similarly, and absent an explicit agreement between the parties to the litigation or a fee-shifting statute, expert witness fees are not recoverable above the statutory rate of $40 per day for regular witnesses. Defendant's request for expert witness fees in the amount of $6,630.32 must be disallowed.

Compensation of Interpreters/Translators - 28 U.S.C. § 1920(6)

The court has reviewed the billing statements of the translators used by defendant and finds their use

necessary for the reasons stated in Mr. Roberts' amended affidavit of January 5, 2009, and their fees reasonable in all respects. Costs for such services are awarded in the amount of $5,517.20.

FOR THE FOREGOING REASONS, defendant is awarded total costs in the amount of $7,732.20.

IT IS SO ORDERED.

DATED this 8th day of January, 2009.

/s/ Alex R. Munson

ALEX R. MUNSON

Judge

APPENDIX E

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

KOICHI TANIGUCHI, Plaintiff, v. KAN PACIFIC SAIPAN, LTD., dba MARIANA RESORT AND SPA, Defendant.	Civil Case No. 08-0008 **ORDER DENYING PLAINTIFF'S MOTION OBJECTING TO COSTS**

Now before the Court is Plaintiff Koichi Taniguchi's Motion Objecting to Taxation of Costs. The Court finds this motion suitable for decision without oral argument. *See* Local Rule 7.1(a). Having carefully reviewed the plaintiff's motion and the relevant legal authority, the Court hereby DENIES the motion.

Plaintiff objects to the following allegedly unreasonable costs taxed by the Court: (1) depositions that were "purely investigative" and not for use at trial; and (2) "translation services" that are not authorized under 28 U.S.C. § 1920(6). The Court will address each argument in turn.

A. The Deposition Costs Were Properly Taxed.

First, Plaintiff argues that the Court improperly granted Defendants' costs for a deposition that were "purely investigatory" in nature and not for use at trial. (Mot. at 2.) Deposition transcripts are taxable as costs under 28 U.S.C. § 1920(2) if they are "necessarily obtained for use in the case." *Evanow v. M/V Neptune*, 163 F.3d 1108, 1118 (9th Cir. 1998). The costs of obtaining depositions and deposition transcripts are "necessarily obtained" if they were reasonably necessary to the defendant's motion for summary judgment. *Alflex Corp. v. Underwriters Lab., Inc.*, 914 F.2d 175, 177 (9th Cir. 1990). Here, Plaintiff argues, without explanation, that the taking of his deposition in a personal injury action was "purely investigative" and therefore not reasonably necessary to the defendant's motion for summary judgment motion. However, the deposition was of the injured party in a personal injury case. It is unclear to the Court how such a deposition would not be reasonably necessary for the defendants to prepare for trial or a summary judgment motion. The Court is not persuaded that the deposition was "purely investigative" and finds the costs reasonable and within the limits of the law.

B. The Interpreter and/or Translation Costs Were Properly Taxed.

Next, Plaintiff argues that the Court improperly taxed costs for Mr. Colin P.A. Jones' translation and "other" professional services, rather than solely for his interpreter services. Title 28 U.S.C. § 1920(6) authorizes "compensation of interpreters." Two circuits have addressed whether general translation services should fall within the meaning of § 1920(6). The Sixth Circuit held that "compensation of

interpreters" includes general translation services because "the definition of interpret expressly includes to 'translate into intelligible or familiar language.'" *BDT Products, Inc. v. Lexmark Intern., Inc.*, 405 F.3d 415,419 (6th Cir. 2005). On the other hand, the Seventh Circuit recently held that "compensation of interpreters" does not *per se* include general translation services. *Extra Equipamentos E Exportacao Ltda. v. Case Corp.*, *541* F.3d 719, 728 (7th Cir. 2008). Here, the Court finds the Sixth Circuit's rule most persuasive. The services rendered to the defense cannot be separated into "translation" and "interpretation." In order to depose Plaintiff, the defense required documents translated. The costs for such "translations" falls within the meaning of "compensation of an interpreter." Accordingly, the Court finds that the interpreter services were properly taxed as costs.

Finally, Plaintiff requests that the Court stay the payment of the taxed costs pending his appeal of this matter and that Defendant not be compensated directly since its insurer incurred all of the costs that Defendant seeks. *(See* Amended Roberts Affidavit ¶ 1.) The Court hereby exercises its discretion not to stay the imposition of costs pending appeal. Moreover, Plaintiff may either pay the amount due directly to defense counsel who, as an officer of the Court, has a responsibility to transfer the costs to the party that paid them, or to deposit the amount directly with the Court's registry to be held pending resolution of Plaintiffs appeal. Plaintiff shall pay or deposit with the Court the amount due by January 29,2009.

IT IS SO ORDERED.

Dated: January 15, 2009

/s/ Alex R. Munson

ALEX R. MUNSON
UNITED STATES
DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KOUICHI TANIGUCHI, Plaintiff - Appellant, v. KAN PACIFIC SAIPAN, LTD., doing business as Mariana Resort and Spa, Defendant - Appellee.	No. 09-15212 D.C. No. 1:08-cv-00008 District of the Northern Mariana Islands ORDER

FILED

MAY 11 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Before: HAWKINS, McKEOWN, and RAWLINSON, Circuit Judges.

The panel has voted to deny the Petition for Panel Rehearing.

Appellant's Petition for Panel Rehearing, filed on March 19, 2011, is DENIED.

APPENDIX G

28 U.S.C. § 1827 provides:

§ 1827. Interpreters in courts of the United States

(a) The Director of the Administrative Office of the United States Courts shall establish a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States.

(b)(1) The Director shall prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters, when the Director considers certification of interpreters to be merited, for the hearing impaired (whether or not also speech impaired) and persons who speak only or primarily a language other than the English language, in judicial proceedings instituted by the United States. The Director may certify interpreters for any language if the Director determines that there is a need for certified interpreters in that language. Upon the request of the Judicial Conference of the United States for certified interpreters in a language, the Director shall certify interpreters in that language. Upon such a request from the judicial council of a circuit and the approval of the Judicial Conference, the Director shall certify interpreters for that circuit in the language requested. The judicial council of a circuit shall identify and evaluate the needs of the districts within a circuit. The Director shall certify interpreters based on the results of criterion-referenced performance examinations. The Director

shall issue regulations to carry out this paragraph within 1 year after the date of the enactment of the Judicial Improvements and Access to Justice Act.

(2) Only in a case in which no certified interpreter is reasonably available as provided in subsection (d) of this section, including a case in which certification of interpreters is not provided under paragraph (1) in a particular language, may the services of otherwise qualified interpreters be used. The Director shall provide guidelines to the courts for the selection of otherwise qualified interpreters, in order to ensure that the highest standards of accuracy are maintained in all judicial proceedings subject to the provisions of this chapter.

(3) The Director shall maintain a current master list of all certified interpreters and otherwise qualified interpreters and shall report periodically on the use and performance of both certified and otherwise qualified interpreters in judicial proceedings instituted by the United States and on the languages for which interpreters have been certified. The Director shall prescribe, subject to periodic review, a schedule of reasonable fees for services rendered by interpreters, certified or otherwise, used in proceedings instituted by the United States, and in doing so shall consider the prevailing rate of compensation for comparable service in other governmental entities.

(c)(1) Each United States district court shall maintain on file in the office of the clerk, and each United States attorney shall maintain on file, a list of all persons who have been certified as interpreters by the Director in accordance with subsection (b) of this section. The clerk shall make the list of certified interpreters for judicial proceeding available upon

request.

(2) The clerk of the court, or other court employee designated by the chief judge, shall be responsible for securing the services of certified interpreters and otherwise qualified interpreters required for proceedings initiated by the United States, except that the United States attorney is responsible for securing the services of such interpreters for governmental witnesses.

(d)(1) The presiding judicial officer, with the assistance of the Director of the Administrative Office of the United States Courts, shall utilize the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise qualified interpreter, in judicial proceedings instituted by the United States, if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case), or a witness who may present testimony in such judicial proceedings--

(A) speaks only or primarily a language other than the English language; or

(B) suffers from a hearing impairment (whether or not suffering also from a speech impairment)

so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony.

(2) Upon the motion of a party, the presiding judicial officer shall determine whether to require the electronic sound recording of a judicial proceeding in which an interpreter is used under this section. In

making this determination, the presiding judicial officer shall consider, among other things, the qualifications of the interpreter and prior experience in interpretation of court proceedings; whether the language to be interpreted is not one of the languages for which the Director has certified interpreters, and the complexity or length of the proceeding. In a grand jury proceeding, upon the motion of the accused, the presiding judicial officer shall require the electronic sound recording of the portion of the proceeding in which an interpreter is used.

(e)(1) If any interpreter is unable to communicate effectively with the presiding judicial officer, the United States attorney, a party (including a defendant in a criminal case), or a witness, the presiding judicial officer shall dismiss such interpreter and obtain the services of another interpreter in accordance with this section.

(2) In any judicial proceedings instituted by the United States, if the presiding judicial officer does not appoint an interpreter under subsection (d) of this section, an individual requiring the services of an interpreter may seek assistance of the clerk of court or the Director of the Administrative Office of the United States Courts in obtaining the assistance of a certified interpreter.

(f)(1) Any individual other than a witness who is entitled to interpretation under subsection (d) of this section may waive such interpretation in whole or in part. Such a waiver shall be effective only if approved by the presiding judicial officer and made expressly by such individual on the record after opportunity to consult with counsel and after the presiding judicial officer has explained to such individual, utilizing the services of the most available

certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise competent interpreter, the nature and effect of the waiver.

(2) An individual who waives under paragraph (1) of this subsection the right to an interpreter may utilize the services of a noncertified interpreter of such individual's choice whose fees, expenses, and costs shall be paid in the manner provided for the payment of such fees, expenses, and costs of an interpreter appointed under subsection (d) of this section.

(g)(1) There are authorized to be appropriated to the Federal judiciary, and to be paid by the Director of the Administrative Office of the United States Courts, such sums as may be necessary to establish a program to facilitate the use of certified and otherwise qualified interpreters, and otherwise fulfill the provisions of this section and the Judicial Improvements and Access to Justice Act, except as provided in paragraph (3).

(2) Implementation of the provisions of this section is contingent upon the availability of appropriated funds to carry out the purposes of this section.

(3) Such salaries, fees, expenses, and costs that are incurred with respect to Government witnesses (including for grand jury proceedings) shall, unless direction is made under paragraph (4), be paid by the Attorney General from sums appropriated to the Department of Justice.

(4) Upon the request of any person in any action for which interpreting services established pursuant to subsection (d) are not otherwise provided, the clerk of the court, or other court employee designated by the chief judge, upon the request of the presiding judicial

officer, shall, where possible, make such services available to that person on a cost-reimbursable basis, but the judicial officer may also require the prepayment of the estimated expenses of providing such services.

(5) If the Director of the Administrative Office of the United States Courts finds it necessary to develop and administer criterion-referenced performance examinations for purposes of certification, or other examinations for the selection of otherwise qualified interpreters, the Director may prescribe for each examination a uniform fee for applicants to take such examination. In determining the rate of the fee for each examination, the Director shall consider the fees charged by other organizations for examinations that are similar in scope or nature. Notwithstanding section 3302(b) of title 31, the Director is authorized to provide in any contract or agreement for the development or administration of examinations and the collection of fees that the contractor may retain all or a portion of the fees in payment for the services. Notwithstanding paragraph (6) of this subsection, all fees collected after the effective date of this paragraph and not retained by a contractor shall be deposited in the fund established under section 1931 of this title and shall remain available until expended.

(6) Any moneys collected under this subsection may be used to reimburse the appropriations obligated and disbursed in payment for such services.

(h) The presiding judicial officer shall approve the compensation and expenses payable to interpreters, pursuant to the schedule of fees prescribed by the Director under subsection (b)(3).

(i) The term "presiding judicial officer" as used in this

section refers to any judge of a United States district court, including a bankruptcy judge, a United States magistrate judge, and in the case of grand jury proceedings conducted under the auspices of the United States attorney, a United States attorney.

(j) The term "judicial proceedings instituted by the United States" as used in this section refers to all proceedings, whether criminal or civil, including pretrial and grand jury proceedings (as well as proceedings upon a petition for a writ of habeas corpus initiated in the name of the United States by a relator) conducted in, or pursuant to the lawful authority and jurisdiction of a United States district court. The term "United States district court" as used in this subsection includes any court which is created by an Act of Congress in a territory and is invested with any jurisdiction of a district court established by chapter 5 of this title.

(k) The interpretation provided by certified or otherwise qualified interpreters pursuant to this section shall be in the simultaneous mode for any party to a judicial proceeding instituted by the United States and in the consecutive mode for witnesses, except that the presiding judicial officer, sua sponte or on the motion of a party, may authorize a simultaneous, or consecutive interpretation when such officer determines after a hearing on the record that such interpretation will aid in the efficient administration of justice. The presiding judicial officer, on such officer's motion or on the motion of a party, may order that special interpretation services as authorized in section 1828 of this title be provided if such officer determines that the provision of such services will aid in the efficient administration of justice.

(l) Notwithstanding any other provision of this section or section 1828, the presiding judicial officer may appoint a certified or otherwise qualified sign language interpreter to provide services to a party, witness, or other participant in a judicial proceeding, whether or not the proceeding is instituted by the United States, if the presiding judicial officer determines, on such officer's own motion or on the motion of a party or other participant in the proceeding, that such individual suffers from a hearing impairment. The presiding judicial officer shall, subject to the availability of appropriated funds, approve the compensation and expenses payable to sign language interpreters appointed under this section in accordance with the schedule of fees prescribed by the Director under subsection (b)(3) of this section.

28 U.S.C. § 1828 provides:

§ 1828. Special interpretation services

(a) The Director of the Administrative Office of the United States Courts shall establish a program for the provision of special interpretation services in criminal actions and in civil actions initiated by the United States (including petitions for writs of habeas corpus initiated in the name of the United States by relators) in a United States district court. The program shall provide a capacity for simultaneous interpretation services in multidefendant criminal actions and multidefendant civil actions.

(b) Upon the request of any person in any action for which special interpretation services established pursuant to subsection (a) are not otherwise provided, the Director, with the approval of the

presiding judicial officer, may make such services available to the person requesting the services on a reimbursable basis at rates established in conformity with section 9701 of title 31, but the Director may require the prepayment of the estimated expenses of providing the services by the person requesting them.
(c) Except as otherwise provided in this subsection, the expenses incident to providing services under subsection (a) of this section shall be paid by the Director from sums appropriated to the Federal judiciary. A presiding judicial officer, in such officer's discretion, may order that all or part of the expenses shall be apportioned between or among the parties or shall be taxed as costs in a civil action, and any moneys collected as a result of such order may be used to reimburse the appropriations obligated and disbursed in payment for such services.

(d) Appropriations available to the Director shall be available to provide services in accordance with subsection (b) of this section, and moneys collected by the Director under that subsection may be used to reimburse the appropriations charged for such services. A presiding judicial officer, in such officer's discretion, may order that all or part of the expenses shall be apportioned between or among the parties or shall be taxed as costs in the action.

28 U.S.C. § 1920 provides:

§ 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

OPPOSITION BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
AUG 5 - 2011
OFFICE OF THE CLERK

No. 10-1472

In the Supreme Court of the United States

KOUICHI TANIGUCHI,

Petitioner,

v.

KAN PACIFIC SAIPAN, LTD.,
doing business as Marianas Resort and Spa,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS L. ROBERTS
Dooley Roberts & Fowler LLP
Suite 201, Orlean Pacific Plaza
865 S. Marine Corps Dr.
Tamuning, Guam 96913
(671) 646-1222

DAN HIMMELFARB
Counsel of Record
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
dhimmelfarb@mayerbrown.com

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether "compensation of interpreters," a taxable cost under 28 U.S.C. § 1920(6), includes compensation of those who translate written as well as spoken words.

CORPORATE DISCLOSURE STATEMENT

Respondent Kan Pacific Saipan, Ltd., d/b/a Mariana Resort and Spa, has no parent corporation and no publicly held company owns 10% or more of respondent's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT 2

REASONS FOR DENYING THE PETITION 5

A. The Decision Below Is Correct 5

B. There Is No Circuit Conflict That Warrants This Court's Intervention At This Time 13

C. The Question Presented Is Not One Of Exceptional Importance 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

CASES

Aerotech Res., Inc. v. *Dodson Aviation, Inc.*, 237 F.R.D. 659 (D. Kan. 2005).....20

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975).....11

Arboireau v. *Adidas Salomon AG*, 2002 WL 31466564 (D. Or. June 14, 2002).....20

BDT Prods., Inc. v. *Lexmark Int'l, Inc.*, 405 F.3d 415 (6th Cir. 2005).....4, 14

Castillo v. *Teledyine Cont'l Motors, Inc.*, 2011 WL 1343051 (S.D. Fla. Mar. 16, 2011).....20

Chacon v. *El Milagro Care Ctr., Inc.*, 2010 WL 3023833 (S.D. Fla. July 29, 2010).....20

Chore-Time Equip., Inc. v. *Cumberland Corp.*, 713 F.2d 774 (Fed. Cir. 1983).....14, 15, 20

Competitive Techs. v. *Fujitsu Ltd.*, 2006 WL 6338914 (N.D. Cal. Aug. 23, 2006).....20

Crawford Fitting Co. v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987).....2, 3

Dattner v. *Conagra Food, Inc.*, 2005 WL 1963937 (S.D.N.Y. Aug. 16, 2005), vacated per curiam, 458 F.3d 98 (2d Cir. 2006).....20

TABLE OF AUTHORITIES—continued

Page(s)

Del. Valley Floral Group, Inc. v. *Shaw Rose Nets, L.L.C.*, 2009 WL 5127941 (S.D. Fla. Nov. 6, 2009) 16, 20

Extra Equipamentos E Exportacao Ltda. v. *Case Corp.*, 541 F.3d 719 (7th Cir. 2008) 7, 14, 17, 18

F. Hoffmann-La Roche Ltd. v. *Empagran S.A.*, 542 U.S. 155 (2004) 13

FCC v. *AT&T Inc.*, 131 S. Ct. 1177 (2011) 7

Flores-Torres v. *Holder*, 2010 WL 1910011 (N.D. Cal. May 11, 2010) 20

Galvez v. *Cuevas*, 2009 WL 1024632 (S.D. Fla. Apr. 15, 2009) 20

Gidding v. *Anderson*, 2008 WL 5068524 (N.D. Cal. Nov. 24, 2008) 20

Gomez-Perez v. *Potter*, 553 U.S. 474 (2008) 12

Hamilton v. *Lanning*, 130 S. Ct. 2464 (2010) 6

TABLE OF AUTHORITIES—continued

Page(s)

Horizon Hobby, Inc. v. *Ripmax Ltd.*, 2009 WL 3381163 (C.D. Ill. Oct. 15, 2009), aff'd per curiam, 397 F. App'x 627 (Fed. Cir. 2010) 20

Hui v. *Castaneda*, 130 S. Ct. 1845 (2010) 5

Hynix Semiconductor Inc. v. *Rambus Inc.*, 697 F. Supp. 2d 1139 (N.D. Cal. 2010) 20

In re P.R. Elec. Power Auth., 687 F.2d 501 (1st Cir. 1982) 15

Johnson v. *S. Pac. Co.*, 196 U.S. 1 (1904) 12

Johnson v. *United States*, 529 U.S. 694 (2000) 6

Maker's Mark Distillery, Inc. v. *Diageo N. Am., Inc.*, 2010 WL 2651186 (W.D. Ky. June 30, 2010) 20

McCray v. *New York*, 461 U.S. 961 (1983) 18

Merck Sharp & Dohme Pharm., SRL v. *Teva Pharm. USA, Inc.*, 2010 WL 1381413 (D.N.J. Mar. 31, 2010) 20

TABLE OF AUTHORITIES—continued

Page(s)

Microsoft Corp. v. *i4i Ltd. P'ship*,
131 S. Ct. 2238 (2011) 10

Neles-Jamesbury, Inc. v. *Fisher Controls Int'l, Inc.*, 140 F. Supp. 2d 104 (D. Mass. 2001) 20

Pan Am. Grain Mfg. Co. v. *Puerto Rico Ports Auth.*, 193 F.R.D. 26 (D.P.R. 2000), aff'd, 295 F.3d 108 (1st Cir. 2002) 21

Porcelanas Florencia, S.A. v. *Caribbean Resort Suppliers, Inc.*, 2009 WL 1456338 (S.D. Fla. May 22, 2009) 20

Quy v. *Air America, Inc.*,
667 F.2d 1059 (D.C. Cir. 1981) 14, 15, 20

Ricoh Corp. v. *Pitney Bowes Inc.*,
2007 WL 1852553 (D.N.J. June 26, 2007) 17

Shared Med. Sys. v. *Ashford Presbyterian Cmty. Hosp.*, 212 F.R.D. 50 (D.P.R. 2002) 20

Slagenweit v. *Slagenweit*,
63 F.3d 719 (8th Cir. 1995) (per curiam) 15, 20

Studiengesellschaft Kohle mbH v. *Eastman Kodak Co.*, 713 F.2d 128 (5th Cir. 1983) 15

Tesler v. *Costa Crociere S.p.A.*,
2009 WL 1851091 (S.D. Fla. June 29, 2009) 20

TABLE OF AUTHORITIES—continued

Page(s)

Tharo Sys., Inc. v. *Cab Produkttechnik*, 2005 WL 1123595 (N.D. Ohio May 10, 2005) 20

Tilton v. *Capital Cities/ABC, Inc.*, 115 F.3d 1471 (10th Cir. 1997) 15, 16, 20

United States v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) 12

V-Formation, Inc. v. *Benetton Grp. SPA*, 2003 WL 21403326 (S.D.N.Y. June 17, 2003) 20

Zayas v. *Puerto Rico*, 451 F. Supp. 2d 310 (D.P.R. 2006) 20

STATUTES AND RULES

Court Interpreters Act, Pub L. No. 95-539, 92 Stat. 2040 (1978) 7, 8, 9, 11

Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub L. No. 109-162, tit. II, § 201(14), 119 Stat. 2960, 2994 (2006) 10

20 U.S.C. § 6319(g)(2) 10

28 U.S.C. § 1827 ..... 8, 9, 11

28 U.S.C. § 1827(a) 8

TABLE OF AUTHORITIES—continued

Page(s)

28 U.S.C. § 1827(b)(1) 10

28 U.S.C. § 1828 .....8, 9, 12

28 U.S.C. § 1828(a) 8

28 U.S.C. § 1920 .....2, 3, 7, 12

28 U.S.C. § 1920(6) .....*passim*

28 U.S.C. § 2412(a)(1) 12

Fed. R. Civ. P. 34 15

Fed. R. Civ. P. 54(d) 2, 3

Fed. R. Evid. 706 8

OTHER AUTHORITIES

Black's Law Dictionary (9th ed. 2009) 6

Cong. Globe App., 32d Cong., 2d Sess. 207 (1853) 10, 11

H.R. Rep. No. 95-1687 (1978) 8

Merriam-Webster's Collegiate Dictionary (11th ed. 2004) 7

Webster's Third New International Dictionary (1976) 6, 7

TABLE OF AUTHORITIES—continued

Page(s)

10 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed. 1998) 3

RESPONDENT'S BRIEF IN OPPOSITION

Petitioner asks this Court to grant certiorari to decide whether, in the statute authorizing a prevailing party to recover costs, "compensation of interpreters" includes compensation of those who translate written as well as spoken words. He contends that (1) the decision below incorrectly answered that question yes; (2) there is a seven-to-one circuit conflict on the question; and (3) the question is one of exceptional importance. Petitioner is mistaken on each point.

First, the ordinary meaning of "interpreters" encompasses those who translate documents, and there is no indication that Congress intended anything other than the ordinary meaning in 28 U.S.C. § 1920(6). That is not surprising, since documentary evidence is no less important—and sometimes more important—than testimonial evidence. The decision below is therefore correct.

Second, even with the court of appeals' decision in this case, there are only three circuits—not eight, as petitioner maintains—that have squarely addressed the issue, and only one of them has endorsed petitioner's position. The two-to-one circuit conflict could be resolved without this Court's intervention, and even if it were not, the Court's ultimate resolution of the issue would benefit from further percolation.

Third, there is particular reason to await further development in the lower courts, because, contrary to petitioner's claim, the issue is not especially important, and certainly is not *exceptionally* important, inasmuch as awards for the cost of translating documents are typically quite modest.

The petition should be denied.

STATEMENT

1. "Section 1920 [of Title 28 of the United States Code] enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d) [of the Federal Rules of Civil Procedure]." *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 441-442 (1987). Section 1920 provides as follows:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

Section 1920 "is phrased permissively because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party." *Crawford Fitting*, 482 U.S. at 442. "In keeping with the discretionary character of the rule, the federal courts are free to pursue a case-by-case approach and to make their decisions on the basis of the circumstances and equities of each case." 10 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2668, at 231 (3d ed. 1998).

2. Petitioner Kouichi Taniguchi was for a time a professional baseball player in Japan. On November 6, 2006, he took a tour of respondent Kan Pacific Saipan, Ltd.'s premises, the Mariana Resort and Spa in Saipan. During the tour, a piece of wooden deck broke beneath him and his leg fell through a hole. Pet. App. 2a, 13a.

On February 11, 2008, petitioner filed a negligence action against respondent in the United States District Court for the District of the Northern Mariana Islands. He alleged that he sustained injuries from the fall and that, as a result of the injuries, he incurred medical expenses and could not honor certain contractual obligations. Pet. App. 2a, 13a.

3. The district court granted summary judgment to respondent, on the ground that petitioner could not prove that respondent failed to exercise reasonable care. Pet. App. 12a-17a. The court subsequently awarded respondent a total of $7,732.20 in costs—$2,215 for transcripts of two depositions of petitioner and $5,517.20 for interpreter services, which included the translation of contracts, medical records, and other documents from Japanese to English. *Id.* at 19a-22a; Aff. of Tim Roberts, Esq. in Support of Bill of Costs, Exs. 2, 6, *Taniguchi* v. *Kan Pacific Sai-*

pan, Ltd., No. 1:08-cv-00008 (D. N. Mar. I. Dec. 31, 2008). In overruling petitioner's objections to these costs, the court concluded that the costs of translating documents are allowable under 28 U.S.C. § 1920(6), which authorizes a district court to tax, among other costs, "compensation of interpreters," and found that the costs should be awarded in this case because "the defense required documents translated" "[i]n order to depose Plaintiff." Pet. App. 24a-25a.

4. The court of appeals affirmed both the district court's grant of summary judgment, Pet. App. 9a-11a, and its award of costs, *id.* at 1a-8a. As relevant here, the court of appeals rejected petitioner's contention that "the district court erred in awarding costs for translation services used by Kan Pacific during the litigation." *Id.* at 4a.

As the court of appeals observed, the Sixth Circuit has held that "awarding costs for translation of documents necessary for litigation is appropriate." Pet. App. 6a. It relied in so holding "on a dictionary definition of interpret, which included 'to translate into intelligible or familiar language.'" *Ibid.* (quoting *BDT Prods., Inc.* v. *Lexmark Int'l, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005)). The court of appeals agreed with that decision. "In § 1920(6)," the court explained, "the word 'interpreter' can reasonably encompass a 'translator,' both according to the dictionary definition and common usage of these terms, which does not always draw precise distinctions between foreign language interpretations involving live speech versus written documents." *Id.* at 7a. The court thus held that, "within the meaning of § 1920(6), the prevailing party should be awarded costs for services required to interpret either live

speech or written documents into a familiar language, so long as interpretation of the items is necessary to the litigation." *Ibid.*

The court of appeals then determined that that standard was satisfied here. "As Taniguchi alleged that his injuries caused him to lose compensation from his negotiated contract deals," the court explained, "it was necessary for Kan Pacific to have Taniguchi's documents and medical records translated to adequately prepare its defense." Pet. App. 7a-8a. And because the court of appeals "conclude[d] that § 1920(6) contemplates the award of costs for translation services," it "h[e]ld that the district court acted within its discretion when it determined that translation services were necessary to render pertinent documents intelligible to the litigants." *Id.* at 8a.

REASONS FOR DENYING THE PETITION

Petitioner seeks review of the court of appeals' holding that "compensation of interpreters" in 28 U.S.C. § 1920(6) includes compensation of those who translate written as well as spoken words. The decision below is correct; there is no circuit conflict that warrants this Court's intervention at this time; and the question presented is not one of exceptional importance. Further review is therefore unwarranted.

A. The Decision Below Is Correct

The court of appeals correctly held that the term "interpreters" in Section 1920(6) encompasses those who translate written words.

1. The "inquiry in this case begins and ends with the text" of the statute. *Hui* v. *Castaneda*, 130 S. Ct. 1845, 1850 (2010). Section 1920(6) provides that a

judge or clerk of a federal court may tax as costs "compensation of interpreters." The term "interpreters" is not defined in the statute. "When terms used in a statute are undefined, [this Court] give[s] them their ordinary meaning." *Hamilton* v. *Lanning*, 130 S. Ct. 2464, 2471 (2010) (internal quotation marks omitted). The ordinary meaning of "interpreter" is "one that translates," *Webster's Third New International Dictionary* 1182 (1976) (*Webster's Third*), and "translate" means "to turn into one's own or another language," *id.* at 2429.

The ordinary meaning of "interpreter" thus contains no "limitation to spoken communication," as petitioner maintains. Pet. 17. On the contrary, the relevant definition of the word in one of "the most authoritative dictionaries" of American English, *Johnson* v. *United States*, 529 U.S. 694, 706 n.9 (2000), reads, in full, as follows: "one that translates; *esp* : a person who translates orally for parties conversing in different tongues." *Webster's Third* 1182. The definition of "interpreter" in the leading law dictionary is essentially the same: "[a] person who translates, esp. orally, from one language to another." *Black's Law Dictionary* 895 (9th ed. 2009). Petitioner's submission that an "interpreter" is *only* a person who translates orally is inconsistent with these definitions. "Especially" does not mean "only," and Congress should thus be presumed to have included translators of both spoken and written words when it used the term "interpreter" in Section 1920(6) without qualification.

The only appellate court to have concluded otherwise—the Seventh Circuit—acknowledged that the word "especially" in the definition "leaves open the possibility that an interpretation can sometimes be

of a document." *Extra Equipamentos E Exportacao Ltda.* v. *Case Corp.*, 541 F.3d 719, 728 (7th Cir. 2008). But it thought that possibility was accounted for by the circumstance in which "a judge interprets statutes." *Ibid.* This reasoning is fundamentally flawed, because a judge who interprets a statute is not "one that translates" at all. *Webster's Third* 1182. The act of statutory interpretation is covered by a separate definition of "interpreter": "one that interprets, explains, or expounds." *Ibid.* Under the definition relevant here, an "interpreter" is a person who *translates* either orally or in writing.

For his part, petitioner simply ignores the definition of "interpreter" in *Webster's Third New International Dictionary*, and cites instead the definition in *Webster's Collegiate Dictionary*. Pet. 17. That dictionary does not support his position either. The definition of "interpreter" from which petitioner quotes is not, as he claims, "one who translates orally for parties conversing in different languages." *Ibid.* It is "one that interprets: as * * * : one who translates orally for parties conversing in different languages." *Merriam-Webster's Collegiate Dictionary* 654 (11th ed. 2004). The "as" in this definition, like the "esp" in the other, shows that an oral translator is merely one type of interpreter.

2. "The construction of statutory language often turns on context," *FCC* v. *AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011), but there is nothing in the context of Section 1920(6) to indicate that, contrary to the ordinary meaning of "interpreter," Congress meant to cover only those who translate spoken words. In arguing otherwise, petitioner relies on the Court Interpreters Act, Pub L. No. 95-539, 92 Stat. 2040 (1978), which added subsection (6) to 28 U.S.C.

§ 1920, and makes two related points. He contends that Section 1920(6) addresses "the same subject" as the substantive provisions of the Court Interpreters Act (which he claims are limited to oral translation) and that the services of "interpreters" in Section 1920(6) must have "the same meaning" as "special interpretation services" in Section 1920(6) (the latter of which are described in a substantive provision of the Court Interpreters Act). Pet. 17-18. These contentions lack merit.

To begin with, Section 1920(6) does *not* address the "same subject" as the substantive provisions of the Court Interpreters Act (Sections 1827 and 1828 of Title 28). That subject is quite narrow: the provision of "interpreters" and "special interpretation services" in "judicial proceedings instituted by the United States." 28 U.S.C. §§ 1827(a), 1828(a). The first category of taxable costs in Section 1920(6)—"[c]ompensation of court appointed experts"—has nothing to do with "interpreters" or "special interpretation services" in *any* type of proceedings. See H.R. Rep. No. 95-1687, at 13 (1978) ("Section 7 * * * makes express reference to the taxation of the compensation of a court appointed expert, as permitted by rule 706 of the Federal Rules of Evidence."). The second category of taxable costs in Section 1920(6)—"compensation of interpreters"—is likewise not limited to the "subject" of the substantive provisions of the Court Interpreters Act, because the overwhelming majority of interpreters in federal civil cases provide their services in judicial proceedings that were *not* instituted by the United States and thus only a tiny fraction of interpreters in federal civil cases serve pursuant to the Court Interpreters Act. (In 2009, for example, only 8,702—or approximately three percent—of the 278,884 federal civil cases were

filed by the United States. See www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2009/dec09/C02Dec09.pdf.) For the same reason, the services of "interpreters" in Section 1920(6) cannot have the "same meaning" as "special interpretation services," which are covered by the third category of taxable costs in that provision.

Thus, with the exception of the third category, which specifically refers to "special interpretation services *under section 1828 of this title*" (emphasis added), Section 1920(6) is not tethered to Sections 1827 and 1828. Indeed, had Congress intended to tie the second category of taxable costs—"compensation of interpreters"—to the substantive provisions of the Court Interpreters Act, it could have used language like "compensation of interpreters under section 1827 of this title." But it did not. Once it is recognized that Section 1920(6) has a broader scope than Sections 1827 and 1828, and that it is not merely a "costs analogue" of those provisions, Pet. 18, there is no principled basis for according the term "interpreters" in Section 1920(6) anything other than its ordinary meaning.

3. Petitioner nevertheless contends that "[t]he restriction of 'interpreters' to those who translate spoken language" is "part of a broader congressional convention applied throughout the United States Code." Pet. 19. That is not correct.

While a couple of provisions of the United States Code refer to "interpreters" who make "aurally delivered materials available to individuals with hearing impairments," Pet. 19, those provisions demonstrate only that that is the specific type of "interpreter" with which the provisions are concerned. They do not show that that is the *only* type of interpreter. If

it were, the term would exclude even those who translate orally for non-hearing-impaired "persons who speak only or primarily a language other than the English language." 28 U.S.C. § 1827(b)(1). Petitioner obviously does not take that position.

While a few provisions of the United States Code employ the phrase "interpreters or translators," Pet. 20, moreover, this "kind of excess language" is "hardly unusual," *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2249 (2011), and does not establish that Congress intended "interpreter" to have a more limited meaning than its ordinary one when the term appears by itself. Congress has used "translator" in other statutes to include one who translates orally, thereby confirming the soundness of the court of appeals' conclusion that "'translation' services" and "'interpretation' services" are generally used "interchangeabl[y]." Pet. App. 6a.[1]

4. Quoting a statement from the legislative history of the 1853 cost statute, petitioner contends that "an overriding purpose of the costs statute is to eliminate the danger of 'oppressive' and 'disproportionate' costs awards." Pet. 15 (quoting Cong. Globe App.,

---

[1] See, *e.g.*, 20 U.S.C. § 6319(g)(2) (paraprofessional working in education program supported with federal funds may be assigned to tutor, assist in classroom, assist in computer lab, conduct parental-involvement activities, provide support in library or media center, "act as a translator," or provide instruction to students); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub L. No. 109-162, tit. II, § 201(14), 110 Stat. 2960, 2994 (2006) (congressional finding that "[t]he National Domestic Violence Hotline service is available, toll-free, 24 hours a day and 7 days a week, with bilingual staff, access to translators in 150 languages, and a TTY line for the hearing-impaired").

32d Cong., 2d Sess. 207 (1853) (remarks of Sen. Bradbury)); see also Pet. 3 (same). Insofar as petitioner is suggesting that, as between a broader interpretation of the current cost statute and a narrower one, the narrower one is more consistent with the congressional purpose, that suggestion should be rejected, for the simple reason that the legislator's statement quoted in the petition addressed *attorneys' fees*, not costs.[2] This Court's summary of that statement in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), which the petition truncates, Pet. 2, is to the same effect. See 421 U.S. at 251 ("In support of the proposed legislation, it was asserted * * * that losing litigants were being unfairly saddled with exorbitant *fees for the victor's attorney*." (emphasis added)).

Petitioner contends that the legislative history of the Court Interpreters Act likewise "reinforces" the conclusion that "interpreters" in Section 1920(6) are limited to those who translate spoken words. Pet. 20. It does no such thing. The discussions in the House and Senate Reports on which petitioner relies, Pet. 20-21, address the services covered in Sections 1827 and 1828, not those covered in Section 1920(6). As we have explained, Section 1920(6) encompasses a broader array of services than do Sections 1827

---

[2] See Cong. Globe App., 32d Cong., 2d Sess. 207 ("The abuses that have grown up in the taxation of *attorneys' fees* which the losing party has been compelled to pay in civil suits, have been a matter of serious complaint. The papers before the committee show that in some cases *those costs* have been swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they are taxed, or the labor bestowed." (emphasis added)).

and 1828, and so the latter do not determine the meaning of the former.

5. Petitioner also relies on three interpretive canons. Pet. 22-24. But they do not support his claim that the court of appeals erred in construing "interpreters" in Section 1920(6) to include those who translate written words.

First, the court of appeals' interpretation does not violate the canon that waivers of sovereign immunity should be strictly construed. Pet. 22. The waiver of sovereign immunity identified by petitioner is found in 28 U.S.C. § 2412(a)(1), which unambiguously permits taxation of costs enumerated in 28 U.S.C. § 1920 against the government. "[W]here one statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision, that latter provision 'need not . . . be construed in the manner appropriate to waivers of sovereign immunity.'" *Gomez-Perez* v. *Potter*, 553 U.S. 474, 491 (2008) (quoting *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472-473 (2003)).

Second, the court of appeals' interpretation does not violate the canon that statutes in derogation of the common law should be strictly construed. Pet. 23. "The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law." *Johnson* v. *S. Pac. Co.*, 196 U.S. 1, 17 (1904). "[A]s there is no doubt of that intention here"—Section 1920 and its predecessors unquestionably changed the law that disallowed recovery of costs—"the extent of the application of the change demands * * * no more rigorous construction than would be applied to [other] laws." *Ibid.*

Third, the court of appeals' interpretation does not violate the canon that unreasonable interference with the sovereign authority of other nations should be avoided. Pet. 23-24. "This rule of construction reflects principles of customary international law * * * limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004). The rule does not apply here, because Section 1920(6) authorizes taxation of costs only against a plaintiff—like petitioner—that initiated the case in an American court or a defendant over which jurisdiction in an American court was proper.

6. Including compensation of those who translate written as well as spoken words in the cost statute only makes sense, which is yet another reason to conclude that that is what Congress meant to do. In civil litigation documentary evidence is no less important than testimonial evidence. In many cases—contract actions, for example—it can be more important. As the court of appeals correctly concluded, therefore, there is no less need to "render pertinent documents intelligible to the litigants" than there is to render pertinent testimony intelligible to them. Pet. App. 8a.

B. There Is No Circuit Conflict That Warrants This Court's Intervention At This Time

Petitioner contends that there is a seven-to-one circuit conflict on the question presented in the petition and at least as substantial a conflict among district courts. Pet. 8, 10, 11-12. That is wildly inaccurate. There is in fact a two-to-one circuit conflict on the question, combined with disagreement among

judges in a single district, and it would be premature for this Court to resolve that shallow split of authority now.

1. In 2005, the Sixth Circuit became the first court of appeals to address the question squarely, holding in *BDT Products, Inc.* v. *Lexmark International, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005), that the cost of translating documents is taxable under Section 1920(6). In 2008, the Seventh Circuit reached the contrary conclusion in *Extra Equipamentos*. Then, in 2011, the Ninth Circuit sided with the Sixth Circuit in the decision of which petitioner seeks review, holding that the word "interpreter" in Section 1920(6) encompasses one who translates written words, "both according to the dictionary definition and [to] common usage." Pet. App. 7a.

Petitioner claims that five *other* circuits—in addition to the Sixth and Ninth—have "held," in cases predating the Sixth Circuit's decision in *BDT*, that "a federal court may tax [document] translation costs under section 1920(6)." Pet. 10. That is incorrect. As explained in the very decision on which petitioner relies—the Seventh Circuit's in *Extra Equipamentos*—"[o]ther decisions have allowed such awards, but *BDT* is the only reported appellate decision * * * in which the meaning of the statute was placed in question." 541 F.3d at 728. Contrary to petitioner's assertion, therefore, the decisions of "the First, Fifth, Eighth, D.C., and Federal Circuits" that are cited in the petition, Pet. 10, do not conflict with the decision of the Seventh Circuit.

In *Quy* v. *Air America, Inc.*, 667 F.2d 1059 (D.C. Cir. 1981), for example, the losing party "d[id] not dispute the point that translation costs are allowable." *Id.* at 1065. The same was true in *Chore-Time*

Equipment, Inc. v. *Cumberland Corp.*, 713 F.2d 774 (Fed. Cir. 1983), and *Slagenweit* v. *Slagenweit*, 63 F.3d 719 (8th Cir. 1995) (per curiam). The courts in those cases addressed—and rejected—different arguments: that "the work done * * * was * * * not a translating service," *Quy*, 667 F.2d at 1065 (internal quotation marks omitted); that the translation was "not necessarily obtained for use in the case," *Chore-Time Equip.*, 713 F.2d at 781 (internal quotation marks omitted); and that "the costs for the translated documents were unnecessarily incurred," *Slagenweit*, 63 F.3d at 721.

As for *Studiengesellschaft Kohle mbH* v. *Eastman Kodak Co.*, 713 F.2d 128 (5th Cir. 1983), that decision did not address "the question whether the term 'interpreters' in 28 U.S.C. § 1920(6) encompasses document translators." Pet. 8; see 713 F.2d at 133. And *In re Puerto Rico Electric Power Authority*, 687 F.2d 501 (1st Cir. 1982), did not even review an order awarding costs. Instead, the decision set aside a district court's pre-trial order under Rule 34 of the Federal Rules of Civil Procedure that "requir[ed] [the defendant] to translate (or pay [the plaintiff] the costs of translating) all Spanish language documents produced by [the defendant] in the course of pretrial discovery." *Id.* at 503.

While acknowledging that yet another circuit—the Tenth—"declined to decide the issue" in *Tilton* v. *Capital Cities/ABC, Inc.*, 115 F.3d 1471 (10th Cir. 1997), petitioner claims that that decision nevertheless "indicated skepticism that section 1920(6) permits document translation costs" by citing a decision of a district judge in the Central District of California that held that it does not. Pet. 10-11. That is a highly implausible reading of the Tenth Circuit's de-

cision. The paragraph in question simply noted the losing party's "claim[] that * * * translation costs are not recoverable"; then cited the Central District of California decision; then said that the Tenth Circuit would not address the argument because the party had "failed to raise this issue before the district court." 115 F.3d at 1479. It is quite clear that the district court decision was cited in support of the *party's claim* that the Tenth Circuit declined to reach, not to suggest that the court endorsed that position.

2. Petitioner contends that "[t]he disuniformity in the federal courts is substantially more pronounced than might be indicated by a circuit split of [7]-1," because "the district courts are sharply at odds in the circuits which have yet to resolve the issue"—according to petitioner, "the Second, Third, Fourth, Tenth and Eleventh." Pet. 11. This contention is mistaken in two respects. First, as we explain above, it is inaccurate to say that there is a seven-to-one circuit split. Second, as we explain below, it is inaccurate to say that there is a division of authority among district courts in five other circuits.

Quoting a magistrate judge in the Southern District of Florida, the petition claims that, "[i]n these latter circuits, 'some courts . . . have followed the Seventh Circuit and disallowed translation costs, [and] others have allowed such costs.'" Pet. 11 (quoting *Del. Valley Floral Group, Inc.* v. *Shaw Rose Nets, L.L.C.*, 2009 WL 5127941, at *5 (S.D. Fla. Nov. 6, 2009)). The ellipsis in the quoted language is supplied by petitioner, in place of the words "in this District." *Del. Valley Floral Group*, 2009 WL 5127941, at *5. What the magistrate judge actually said, therefore, is that district courts *in the Southern Dis-*

trict of Florida are divided on this question, not—as the petition implies—that district courts in the Second, Third, Fourth, Tenth, and Eleventh Circuits are.

Nor do the "district court decisions" from the supposedly "undecided circuits" that are cited in the petition, Pet. 11 n.3, demonstrate any division of authority among district courts outside the Southern District of Florida. The cited decisions confirm that some judges within that district have followed the Sixth Circuit, while others have followed the Seventh, on whether the cost of translating documents may be taxed under Section 1920(6). But the only cited decision from outside the Southern District of Florida that disallowed such an award did so, not because the court believed the award was not authorized by the statute, but because the losing party "had already paid for the translation." *Ricoh Corp.* v. *Pitney Bowes Inc.*, 2007 WL 1852553, at *3 (D.N.J. June 26, 2007). And in the three cited decisions from outside the Southern District of Florida that *allowed* such an award, Pet. 12 n.3, as in the pre-*BDT* court of appeals decisions that did so, "the meaning of the statute was [not] placed in question." *Extra Equipamentos*, 541 F.3d at 728.

So there is in fact no "deep and persistent division in the district courts" on the question presented in the petition. Pet. 8. There is a division in the district courts only in the Southern District of Florida, where the issue apparently arises more frequently because of the large number of non-English speakers in South Florida. (Seven of the 11 cases cited in petitioner's division-of-district-court-authority footnote are from the Southern District of Florida. Pet. 11

n.3.) That conflict can be resolved by the Eleventh Circuit. See Sup. Ct. R. 10.

3. On the question whether the cost of translating written as well as spoken words may be taxed under 28 U.S.C. § 1920(6), there is thus a two-to-one circuit conflict and disagreement among district judges in a single district. Far from providing a reason to grant certiorari now, that shows that the Court should allow further percolation.

Only three circuits have squarely addressed the question presented in the petition; only one of them has adopted the position that petitioner advocates; and all three have issued their decisions within the last half dozen years. If other circuits adopt the position of the Sixth and Ninth Circuits, the Seventh Circuit may decide to reconsider the issue en banc and thereby resolve the conflict without any need for this Court's intervention. (It is true that the Seventh Circuit declined to hear *Extra Equipamentos* en banc on its own motion before the decision was issued, 541 F.3d at 728, but at that time there was only a single circuit on either side of the conflict.) If, on the other hand, the Seventh Circuit decides *not* to reconsider the issue, or if other circuits adopt the position of the Seventh Circuit, it may at that point be appropriate for this Court to grant review. But however this issue may develop in the lower courts, "further consideration * * * of the problem by other courts will enable [this Court] to deal with the issue more wisely at a later date." *McCray* v. *New York*, 461 U.S. 961, 962 (1983) (Stevens, J., respecting the denial of certiorari).

C. The Question Presented Is Not One Of Exceptional Importance

In the absence of a mature circuit conflict, a grant of certiorari might be justified if the question presented in the petition were one of exceptional importance. It is not. Far from it.

In arguing otherwise, petitioner suggests that the rule adopted by the court of appeals will create a substantial "danger of oppressive * * * costs awards," and thereby "impose an immense burden on the parties in litigation," by making parties liable for the "potentially exorbitant costs" of translating documents. Pet. 15, 14, 17 (internal quotation marks omitted). That suggestion is totally divorced from reality. As the very cases that are cited in the petition demonstrate, the cost of translating documents in civil cases is rarely "exorbitant," "immense," or "oppressive." Quite the contrary.

The petition focuses on a $1 million award and claims that it was not an "isolated anomaly." Pet. 14. In truth, however, it was. Of the cases cited in the petition, including the "representative sample" of "district court cases since 2000," Pet. 12 n.4, there are by our count 34 in which the court granted or denied an award for the cost of translating documents and the amount of the award is identified in the decision. No other award in those cases exceeded $100,000, and nearly all of them were far less. Twenty-eight of the awards were less than $13,000; 22 of them—including the award in this case—were

less than $6,000; 19 were less than $3,000; and nine were less than $1,000.[3]

---

[3] See *Tilton*, 115 F.3d at 1479 ($1,675); *Slagenweit*, 63 F.3d at 720 (portion of $1,496.56); *Chore-Time Equip.*, 713 F.2d at 776 (portion of $2,932.32); *Quy*, 667 F.2d at 1065 ($412.50); *Castillo* v. *Teledyine Cont'l Motors, Inc.*, 2011 WL 1343051, at *5 (S.D. Fla. Mar. 16, 2011) ($10,884.93); *Chacon* v. *El Milagro Care Ctr., Inc.*, 2010 WL 3023833, at *8 (S.D. Fla. July 29, 2010) ($1,158.13); *Maker's Mark Distillery, Inc.* v. *Diageo N. Am., Inc.*, 2010 WL 2651186, at *3 (W.D. Ky. June 30, 2010) ($190); *Flores-Torres* v. *Holder*, 2010 WL 1910011, at *2 (N.D. Cal. May 11, 2010) (portion of $12,083.14); *Merck Sharp & Dohme Pharm., SRL* v. *Teva Pharm. USA, Inc.*, 2010 WL 1381413, at *6 (D.N.J. Mar. 31, 2010) ($250); *Hynix Semiconductor Inc.* v. *Rambus Inc.*, 697 F. Supp. 2d 1139, 1150 (N.D. Cal. 2010) ($1,977.43); *Del. Valley Floral Group*, 2009 WL 5127941, at *4 ($275); *Horizon Hobby, Inc.* v. *Ripmax Ltd.*, 2009 WL 3381163, at *7 (C.D. Ill. Oct. 15, 2009) ($3,462.90), aff'd per curiam, 397 F. App'x 627 (Fed. Cir. 2010); *Tesler* v. *Costa Crociere S.p.A.*, 2009 WL 1851091, at *2 (S.D. Fla. June 29, 2009) ($300); *Porcelanas Florencia, S.A.* v. *Caribbean Resort Suppliers, Inc.*, 2009 WL 1456338, at *8 (S.D. Fla. May 22, 2009) ($922.50); *Galvez* v. *Cuevas*, 2009 WL 1024632, at *6 (S.D. Fla. Apr. 15, 2009) ($345); Pet. App. 22a ($5,517.20); *Gidding* v. *Anderson*, 2008 WL 5068524, at *1 (N.D. Cal. Nov. 24, 2008) ($7,363.19); *Zayas* v. *Puerto Rico*, 451 F. Supp. 2d 310, 318 (D.P.R. 2006) ($1,426.15); *Competitive Techs.* v. *Fujitsu Ltd.*, 2006 WL 6338914, at *11 (N.D. Cal. Aug. 23, 2006) (portion of $12,594.57); *Aerotech Res., Inc.* v. *Dodson Aviation, Inc.*, 237 F.R.D. 659, 665-666 (D. Kan. 2005) (portion of $2,661.32); *Dattner* v. *Conagra Food, Inc.*, 2005 WL 1963937, at *1 (S.D.N.Y. Aug. 16, 2005) ($9,022.48), vacated per curiam, 458 F.3d 98 (2d Cir. 2006); *Tharo Sys., Inc.* v. *Cab Produkttechnik*, 2005 WL 1123595, at *2 (N.D. Ohio May 10, 2005) ($2,507); *V-Formation, Inc.* v. *Benetton Grp. SPA*, 2003 WL 21403326, at *3 (S.D.N.Y. June 17, 2003) ($781); *Shared Med. Sys.* v. *Ashford Presbyterian Cmty. Hosp.*, 212 F.R.D. 50, 55 (D.P.R. 2002) ($275.30); *Arboireau* v. *Adidas Salomon AG*, 2002 WL 31466564, at *6 (D. Or. June 14, 2002) ($3,399.08); *Neles-Jamesbury, Inc.* v. *Fisher Controls Int'l, Inc.*, 140 F. Supp. 2d 104, 106-107 (D. Mass.

Petitioner also makes the rather extravagant claim that the question presented is one of exceptional importance because taxing the cost of translating foreign-language documents "implicates important issues of international relations and foreign comity." Pet. 15. Unsurprisingly, however, he offers no evidence—not a shred—that any nation has complained, or is even concerned, about these typically modest awards in cases in which the prevailing party had a need to translate documents, the losing party is a foreign national, and the district court exercises its discretion to tax the translating costs. Nor has any foreign government or international organization filed an *amicus curiae* brief suggesting that the question presented has consequences for international relations or foreign comity.

Particularly in a case, like this, in which the decision below is correct and further percolation is warranted, there is no pressing need for the Court to grant certiorari to decide whether the court of appeals erred in adopting a rule that permits an award of costs in a relatively small category of cases that ordinarily amount to no more than a few hundred or a few thousand dollars.

2001) ($10,989); *Pan Am. Grain Mfg. Co.* v. *Puerto Rico Ports Auth.*, 193 F.R.D. 26, 38 (D.P.R. 2000) ($155 and $317.13), aff'd, 295 F.3d 108 (1st Cir. 2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THOMAS L. ROBERTS
Dooley Roberts & Fowler LLP
Suite 201, Orlean Pacific Plaza
865 S. Marine Corps Dr.
Tamuning, Guam 96913
(671) 646-1222

DAN HIMMELFARB
Counsel of Record
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
dhimmelfarb@mayerbrown.com

Counsel for Respondent

AUGUST 2011

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 15 2011
OFFICE OF THE CLERK

No. 10-1472

IN THE

Supreme Court of the United States

KOUICHI TANIGUCHI,

Petitioner,

v.

KAN PACIFIC SAIPAN, LTD.,
doing business as Marianas Resort and Spa,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

DOUGLAS F. CUSHNIE
P.O. BOX 500949
SAIPAN, MP 96950
(670) 234-6843

DONALD B. AYER
Counsel of Record
MICHAEL S. FRIED
CHRISTOPHER J. SMITH
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
dbayer@jonesday.com
(202) 879-3939

August 15, 2011

Counsel for Petitioner

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. THE CIRCUITS ARE DIVIDED SEVEN-TO-ONE REGARDING WHETHER DOCUMENT TRANSLATORS ARE "INTERPRETERS" FOR PURPOSES OF SECTION 1920(6) 2

II. THIS CIRCUIT SPLIT INVOLVES AN IMPORTANT AND RECURRING ISSUE 5

III. THE DECISION BELOW IS WRONG ON THE MERITS 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
421 U.S. 240 (1975) 10

Chore-Time Equip., Inc. v. Cumberland Corp.,
713 F.2d 774 (Fed. Cir. 1983) 3

Competitive Techs. v. Fujitsu Ltd.,
No. C-02-1673, 2006 WL 6338914
(N.D. Cal. Aug. 23, 2006) 5

Cook v. Volkswagen of Am., Inc.,
101 F.R.D. 92 (D.W. Va. 1984) 4

Crawford Fitting Co. v. J.T. Gibbons, Inc.,
482 U.S. 437 (1987) 10

Duncan v. Walker,
533 U.S. 167 (2001) 10

Dystar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.,
No. 6:02-2946-WMC, 2007 WL 3020474
(D.S.C. Oct. 11, 2007) 4, 5

Extra Equipamentos E Exportação Ltda. v. Case Corp.,
No. 01 CV 8591, 2007 WL 1549493
(N.D. Ill. May 24, 2007) 6

Extra Equipamentos E Exportação Ltda. v. Case Corp.,
541 F.3d 719 (7th Cir. 2008) 6, 8

F. Hoffman-La Roche Ltd. v. Empagran S.A.,
542 U.S. 155 (2004) 11

Gabriel Techs. Corp. v. Qualcomm, Inc.,
No. 08CV1992, 2010 WL 3718848
(S.D. Cal. Sept. 20, 2010) 6

TABLE OF AUTHORITIES
(continued)

Page(s)

Gomez-Perez v. Potter,
553 U.S. 474 (2008) 11

In re Korean Airlines Disaster of Sept. 1, 1983,
103 F.R.D. 357 (D.D.C. 1984) 3, 4

In re Puerto Rico Elec. Power Auth.,
687 F.2d 501 (1st Cir. 1982) 3, 4

Johnson v. S. Pac. Co.,
296 U.S. 1 (1904) 11

McKoy v. North Carolina,
494 U.S. 433 (1990) 2

Microsoft Corp. v. i4i Ltd. Partnership,
131 S. Ct. 2238 (2011) 9

Muscarello v. United States,
524 U.S. 125 (1998) 8

Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co. of Va.,
464 U.S. 30 (1983) 11

Oetiker v. Jurid Werke, GmbH,
104 F.R.D. 389 (D.D.C. 1982) 3

Ortho-McNeil Pharm., Inc. v. Mylan Labs, Inc.,
No. 1:02CV32, 2008 WL 7384877
(N.D.W. Va. Aug. 18, 2008) 3

Ortho-McNeil Pharm., Inc. v. Mylan Labs, Inc.,
569 F.3d 1353 (Fed. Cir. 2009) 3, 6

Quy v. Air America, Inc.,
667 F.2d 1059 (D.C. Cir. 1981) 2, 3

TABLE OF AUTHORITIES
(continued)

Page(s)

S.R. Galves Participacao, Importacao & Exportacao Ltda. v. Natural Source Int'l, Ltd.,
No. 06 Civ. 10182(LLS), 2007 WL 1484465 (S.D.N.Y. May 21, 2007) 5

SEC v. Kaufman,
835 F. Supp. 157 (S.D.N.Y. 1993) 5

Slagenweit v. Slagenweit,
63 F.3d 719 (8th Cir. 1995) (per curiam) 4

Société Nationale Industrielle Aérospatiale v. United States Dist. Ct.,
482 U.S. 522 (1987) 7

Studiengesellschaft Kohle mbH v. Eastman Kodak Co.,
713 F.2d 128 (5th Cir. 1983) 4

Trading Techs. Int'l, Inc. v. eSpeed, Inc.,
750 F. Supp. 2d 962 (N.D. Ill. 2010) 6

Viacao Aerea Sao Paulo, S.A. v. Int'l Lease Fin. Corp.,
119 F.R.D. 435 (C.D. Cal. 1988) 5

STATUTES

28 U.S.C. § 1920 ..... *passim*

28 U.S.C. § 2412 11

Court Interpreters Act, Pub. L. No. 95-539,
92 Stat. 2040 (1978) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

Klaus G.E. Baumann, What Does an Interpreter Do? (1997), *available at* http://icdept.cgaux.org/pdf_files/What-does-an-Interpreter-do-IC-Promo-AUG-03.pdf 8

Restatement (Third) of the Foreign Relations Law of the United States § 442 7

Sup. Ct. R. 10 6

Webster's Colligate Dictionary 654 (11th ed. 2003) 8

Webster's II: New Revised University Dictionary 638 (1984) 8

Webster's Third New International Dictionary 1182 (1976) 8

REPLY BRIEF FOR PETITIONER

The decision below deepens a clear, existing circuit split regarding whether the term "interpreters" in 28 U.S.C. § 1920(6) includes those who translate written documents. Pet. 8-12. This issue arises with great frequency in federal litigation, and its incidence will only increase as world trade accelerates and the presence of foreign language speakers in our country increases. For those reasons, it also implicates significant issues of international relations and foreign comity. *Id.* 12-17. The decision below—and thus the position taken by a total of seven circuits—is also wrong, based on the statute's text, its legislative context and history, and longstanding and consistent patterns of congressional usage. *Id.* 17-24.

The brief in opposition urges denial of certiorari, first, because it claims the decision below is correct (Opp. 5-13); second, because it asserts that the circuit conflict, while undeniable, involves fewer circuits than alleged in the petition (*id.* 13-18); and, third, because most of the many cases that confront this question deal with awards of only a few thousand dollars or less (*id.* 19-21).

As shown below, however, respondent's merits argument is unpersuasive for numerous reasons, and ultimately depends upon reading the word "interpreters" to have two inconsistent meanings within a single congressional enactment. Its denial of a 7-1 circuit conflict is just wrong, as a reading of the cases in issue clearly demonstrates. And the issue hardly ceases to merit this Court's attention because most of its numerous applications relate to cost awards in the single-digit thousands, and

because awards in the hundreds of thousands or millions of dollars occur only periodically.

I. THE CIRCUITS ARE DIVIDED SEVEN-TO-ONE REGARDING WHETHER DOCUMENT TRANSLATORS ARE "INTERPRETERS" FOR PURPOSES OF SECTION 1920(6)

1. The courts of appeals are split 7-1 on the question presented. Pet. 8-12. Kan Pacific concedes that there is a split between the Seventh Circuit on the one hand, and the Sixth and Ninth Circuits on the other, but it denies that the other five circuits (the D.C., Federal, First, Fifth, and Eighth) have decided the issue. Opp. 13.

In fact, all five of those circuits have clearly so held, and in each case subsequent decisions have expressly recognized that the issue is conclusively resolved in the respective circuit. Kan Pacific suggests (at 14-15) that the holdings of these circuits are not binding precedent because the parties did not argue the issue. Even if this were true in some of the cases, and Kan Pacific does not cite the appellate briefing in any of them, it would be irrelevant, because any squarely decided legal principle integral to the legal analysis "constitute[s] a binding precedent," "even if the issue had not been disputed." *McKoy v. North Carolina*, 494 U.S. 433, 446 (1990).

D.C. Circuit. In *Quy v. Air America, Inc.*, 667 F.2d 1059 (D.C. Cir. 1981), the court held that "the District Court was authorized to award costs [under section 1920(6)] for the Vietnamese-to-English translations of plaintiffs' depositions," and upheld an award of those costs. *Id.* at 1065. The Ninth Circuit below cited *Quy* as "holding that a cost award for translation . . . was 'explicitly authorized by 28

U.S.C. § 1920(6).'" Pet App. 6a-7a (citing *Quy*, 667 F.2d at 1065). The United States District Court for the District of Columbia has also repeatedly recognized *Quy* as having resolved the issue. *See In re Korean Airlines Disaster of Sept. 1, 1983*, 103 F.R.D. 357, 357 (D.D.C. 1984) ("[T]his Circuit has recognized translation expenses as a pretrial discovery cost which is 'explicitly authorized' by 28 U.S.C. § 1920(6)." (citing *Quy*, 667 F.2d at 1063)); *Oetiker v. Jurid Werke, GmbH*, 104 F.R.D. 389, 393 n.2 (D.D.C. 1982) ("Fees for translation services have been found to fall within the meaning of 'interpreters.'" (citing *Quy*, 667 F.2d at 1065)).

Federal Circuit. In *Chore-Time Equipment, Inc. v. Cumberland Corp.*, 713 F.2d 774 (Fed. Cir. 1983), the panel similarly held that "[t]he award of costs for translation of a German patent . . . was appropriate under 28 U.S.C. § 1920(6)." *Id.* at 782. Any lingering doubt about this holding is eliminated by the subsequent decision of that circuit in *Ortho-McNeil Pharmaceutical, Inc. v. Mylan Laboratories, Inc.*, 569 F.3d 1353 (Fed. Cir. 2009), which again affirmed an award of translation costs. The district court in *Ortho-McNeil* cited *Chore-Time* as controlling Federal Circuit precedent on this point. *See Ortho-McNeil Pharm., Inc. v. Mylan Labs, Inc.*, No. 1:02CV32, 2008 WL 7384877 (N.D.W. Va. Aug. 18, 2008).

First Circuit. *In re Puerto Rico Electric Power Authority*, 687 F.2d 501 (1st Cir. 1982), also ruled that a prevailing party is "free to apply to the district court for reimbursement of its translation expenses as 'costs' under . . . . 28 U.S.C. § 1920." *Id.* at 510. Federal courts have cited this case as holding that

"translation[] costs may be taxed as costs." *In re Korean Airlines Disaster*, 103 F.R.D. at 358; *see also Cook v. Volkswagen of Am., Inc.*, 101 F.R.D. 92, 92 n.* (D.W. Va. 1984) (same).

Fifth Circuit. In *Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 713 F.2d 128 (5th Cir. 1983), the panel held that "translation expenses [are] a taxable cost under . . . section 1920." *Id.* at 133. In doing so, it recognized the First Circuit as having also so held in *Puerto Rico Electric Power*. *See id.* And, once again, subsequent decisions have acknowledged this ruling as the law of the Fifth Circuit. *See In re Korean Airlines Disaster*, 103 F.R.D. at 358; *Cook*, 101 F.R.D. at 92 & n.* (same).

Eighth Circuit. *Slagenweit v. Slagenweit*, 63 F.3d 719 (8th Cir. 1995) (per curiam), upheld a district court's award of document translation costs, ruling that the district court did not "abuse its discretion" in awarding "costs for the translated documents" under section 1920. *Id.* at 721. Subsequent decisions have recognized that *Slagenweit* resolved this issue in the Eighth Circuit. *See Dystar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, No. 6:02-2946-WMC, 2007 WL 3020474, at *2 (D.S.C. Oct. 11, 2007) ("[I]n *Slagenweit* . . . the Eighth Circuit Court of Appeals upheld the district court's taxing of costs with respect to the translation of a deposition transcript that was not introduced at trial.").

In short, notwithstanding Kan Pacific's conclusory assertions, seven circuits have held that document translation costs are taxable under section 1920(6), in disagreement with the Seventh Circuit's contrary holding.

2. The discord on this issue in the federal courts is deeper even than the circuit split reflects on its face, as there is also widespread uncertainty among the district courts. Pet. 11-12. Contrary to Kan Pacific's claim, Opp. 16-17, the Southern District of Florida is not the only district that is internally divided on this issue. *Compare, e.g., S.R. Galves Participacao, Importacao & Exportacao Ltda. v. Natural Source Int'l, Ltd.*, No. 06 Civ. 10182(LLS), 2007 WL 1484465, at *2 (S.D.N.Y. May 21, 2007) (holding that translation costs are taxable under section 1920), *with SEC v. Kaufman*, 835 F. Supp. 157, 159-60 (S.D.N.Y. 1993) (holding that translation costs are *not* taxable under section 1920). More generally, a number of district courts have expressed uncertainty in the absence of controlling precedent on this issue. *See, e.g., Dystar*, 2007 WL 3020474, at *2 (surveying cases in the absence of Fourth Circuit precedent to determine the scope of section 1920(6)); *Competitive Techs. v. Fujitsu Ltd.*, No. C-02-1673, 2006 WL 6338914, at *11 (N.D. Cal. Aug. 23, 2006) (surveying cases prior to the development of Ninth Circuit precedent and noting that "[c]ourts are split" on the issue); *Viacao Aerea Sao Paulo, S.A. v. Int'l Lease Fin. Corp.*, 119 F.R.D. 435, 440 (C.D. Cal. 1988) (holding, prior to binding circuit precedent, that a prevailing party could not recover translation costs).

II. THIS CIRCUIT SPLIT INVOLVES AN IMPORTANT AND RECURRING ISSUE

The question whether section 1920(6) authorizes the taxation of costs associated with document translation is an important issue meriting the Court's review. Pet. 12-17. Federal courts confront the issue frequently, and the ongoing conflict on this issue

undermines the central purpose of the statute to render uniform and consistent costs categories; the allowance of document translation costs creates the persistent risk of occasional large cost awards; and, by magnifying the already large burden and expense of U.S. discovery obligations, it implicates important international comity concerns. *Id.*

Kan Pacific argues that the issue is not of "exceptional" importance.[1] Opp. 19-20. Its arguments on this score are baseless.

First, Kan Pacific claims that, other than the award of more than a million dollars in *Ortho-McNeil*, "[n]o other award in th[e] cases [cited in the Petition] exceeded $100,000." Opp. 19. But Kan Pacific ignores that two cases cited in the Petition, not counting *Ortho-McNeil*, addressed translation costs in excess of $100,000. *See Gabriel Techs. Corp. v. Qualcomm, Inc.*, No. 08CV1992, 2010 WL 3718848, at *12 (S.D. Cal. Sept. 20, 2010) (awarding bond based on estimated translation costs of $182,400); *Trading Techs. Int'l, Inc. v. eSpeed, Inc.*, 750 F. Supp. 2d 962, 983 (N.D. Ill. 2010) (acknowledging translation costs of $109,614, but declining to tax them in light of *Extra Equipamentos*). Other cases have taxed comparably large translation cost awards. *See, e.g., Extra Equipamentos E Exportação Ltda. v. Case Corp.*, No. 01 CV 8591, 2007 WL 1549493, at *5 (N.D. Ill. May 24, 2007) (awarding $75,722 in translation costs), *rev'd*, 541 F.3d 719 (7th Cir. 2008).

---

[1] Contrary to Kan Pacific's implication, Opp. 20-21, the case need not be "exceptionally important" to merit review—it merely must be "important," *see* Sup. Ct. R. 10, a standard that is all the more plainly satisfied here.

These numerous decisions leave no question that the danger of large awards is real and ever-present.

Second, Kan Pacific has no answer to Mr. Taniguichi's showing that a number of foreign nations have expressed concern about subjecting their citizens to the expense and burden of complying with expansive U.S. document discovery, and that this Court has warned of the need to "take care to demonstrate due respect for" minimizing such burdens. *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct.*, 482 U.S. 522, 546 (1987). The imposition of document translation awards plainly implicates these concerns. Kan Pacific's response (at 21) that there is "no evidence" that the foreign nations who have expressed concern over U.S. discovery costs would mind having them magnified in the context of translation awards exhibits a determined refusal to face the obvious implications of those nations' expressed policies. *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States § 442 Reporter's Note 1 (1987) ("No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.").

III. THE DECISION BELOW IS WRONG ON THE MERITS

1. The plain meaning of "interpreters" in section 1920(6) is confined to those who interpret spoken language. Pet. 17-19. Kan Pacific offers no response to the essential point that, as the term is ordinarily used, "no one would refer to [one who translates written literature] as an English-language

'interpreter' of these works." *Extra Equipamentos*, 541 F.3d at 727. In keeping with this usage, a number of dictionaries categorically preclude such an application of the word "interpreter." For instance, one dictionary simply defines "interpreter" as "[o]ne who translates orally from one language into another." Webster's II: New Revised University Dictionary 638 (1984). Another defines the term as "one that interprets: as (a): one who translates orally for parties conversing in different languages." Webster's Colligate Dictionary 654 (11th ed. 2003). Other sources agree that "the difference between interpreting and translation is only the difference in the medium: the interpreter translates orally, while a translator interprets written text." Klaus G.E. Baumann, What Does an Interpreter Do? 1 (1997).[2]

Kan Pacific responds that some other sources implicitly leave open the possibility of non-spoken interpretation as a disfavored alternative meaning. Opp. 6 (citing, *e.g.*, Webster's Third New International Dictionary 1182 (1976) (defining "interpreter" as "one who translates; *esp.*: a person who translates orally for parties conversing in different tongues"). It offers no argument, however, why this disfavored alternative left open by some, but not all, dictionaries should be adopted as the operative definition in section 1920(6). Ordinarily, of course, it is the preferred meaning that presumptively governs in statutory interpretation, not the other way around. *See, e.g.*, *Muscarello v. United States*, 524 U.S. 125, 128 (1998).

---

[2] *Available at* http://icdept.cgaux.org/pdf_files/What-does-an-Interpreter-do-IC-Promo-AUG-03.pdf (last visited Aug. 12, 2011).

2. The applicability of the primary meaning of "interpreter" in section 1920(6) is strongly reinforced by several other considerations.

First, the broader statutory context of the Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040 (1978), requires this meaning. The substantive provisions of that statute established programs for the spoken interpretation of federal court proceedings. Pet. 3-5. Kan Pacific dismisses the relevance of this context, contending that section 1920(6) does not address the "same subject" as the other parts of the statute. Opp. 8. Yet these code sections were part of a single act of Congress. To construe, as Kan Pacific urges, the same word "interpreters" differently in different provisions contravenes the most elementary principles of construction. Kan Pacific's observation (at 8) that section 1920(6) also includes an *additional* term, "court appointed experts," does nothing to support a reading of "interpreters" at odds with the other provisions of the statute addressing interpreters.

Second, Congress consistently distinguishes between interpreters and translators throughout the United States Code. Pet. 19-20. Kan Pacific argues that this congressional usage is mere "excess language." Opp. 10.[3] To the contrary, it is a consistent and repeated pattern of usage, the precise opposite of an inadvertency. The Court, in any event,

---

[3] The case Kan Pacific cites, *Microsoft Corp. v. i4i Ltd. Partnership*, holds only that courts may disregard "excess" statutory language when "no interpretation [of the statute] avoids excess language." 131 S. Ct. 2238, 2248 (2011). Here, Mr. Taniguchi's construction of the statutory provisions *does* avoid the conclusion that the language in question is surplussage.

"give[s] effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Third, the legislative history further confirms the ordinary meaning of "interpreters." Congress enacted the precursor to section 1920, Act of Feb. 26, 1853, 10 Stat. 168, to eliminate the "great diversity in practice among the courts" at the time, and to prevent "losing litigants [from] being unfairly saddled with exorbitant fees." Pet. 2 (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 251 (1975)).

Kan Pacific objects that *Alyeska Pipeline* centered on the attorney fee provisions of the 1853 Act, suggesting that these congressional goals did not apply to the costs statute. Opp. 11. But in fact, this Court has recognized that these principles animate the costs provisions of the statute. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987) (reciting same quotation from *Alyeska Pipeline* in case addressing costs provisions).

Kan Pacific also has no meaningful response to the more recent legislative history of the Court Interpreters Act. Opp. 11-12. It does not dispute that there is no hint of congressional intent to shift document translation expenses. Instead, it repeats its effort to sever section 1920 from the rest of the statute, suggesting that "interpreter" should be given two entirely different meanings within the same Act. There is simply no basis to suppose that Congress intended entirely separate meanings of the word in the same statute, particularly in the absence of any legislative history even mentioning such a disjunction.

3. Three canons counsel the limitation of "interpreters" in section 1920(6) to the spoken word even if there were any ambiguity. Pet. 22-24.

First, Kan Pacific dismisses the canon requiring strict construction of waivers of sovereign immunity, asserting that a strict construction of section 1920 is inappropriate because Congress has unambiguously waived sovereign immunity. Opp. 12 (quoting *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008)). But the entire issue here is whether 28 U.S.C. § 2412(a)(1) unequivocally waives immunity for document translation costs.

Second, Kan Pacific urges disregard for the canon of strict construction of statutes in derogation of the common law, arguing that this rule is only "a recognition of a presumption against an intention to change existing law." Opp. 12 (citing *Johnson v. S. Pac. Co.*, 296 U.S. 1, 17 (1904)). There is, however, a "well-established principle of statutory construction that the common law ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35 (1983).

Third, Kan Pacific dismisses the canon against unreasonable interference with the sovereign authority of other nations, suggesting that it is limited to "the unreasonable exercise of prescriptive jurisdiction." *See* Opp. 12 (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004)). The very case Kan Pacific cites, however makes clear that the canon is not so limited, and that it requires courts "ordinarily [to] construe ambiguous

statutes to avoid unreasonable interference with the sovereign authority of other nations." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DOUGLAS F. CUSHNIE
P.O. BOX 500949
SAIPAN, MP 96950
(670) 234-6843

DONALD B. AYER
Counsel of Record
MICHAEL S. FRIED
CHRISTOPHER J. SMITH
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
dbayer@jonesday.com
(202) 879-3939

Counsel for Petitioner

August 15, 2011

JOINT APPENDIX

RECORD AND BRIEFS

Supreme Ct. U.S.
FILED
NOV 28 2011
OFFICE OF THE CLERK

No. 10-1472

IN THE

Supreme Court of the United States

KOUICHI TANIGUCHI,

Petitioner,

v.

KAN PACIFIC SAIPAN, LTD.,
doing business as Marianas Resort and Spa,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

DAN HIMMELFARB
Counsel of Record
PAUL W. HUGHES
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
dhimmelfarb@mayerbrown.com
(202) 263-3000

THOMAS L. ROBERTS
DOOLEY ROBERTS & FOWLER LLP
Suite 201, Orlean Pacific Plaza
865 S. Marine Corps Dr.
Tamuning, Guam 96913

Counsel for Respondent

DONALD B. AYER
Counsel of Record
MICHAEL S. FRIED
CHRISTOPHER J. SMITH
JANE E. HOLMAN
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
dbayer@jonesday.com
(202) 879-3939

DOUGLAS F. CUSHNIE
P.O. Box 500949
Saipan, MP 96950

November 28, 2011
Counsel for Petitioner

PETITION FOR CERTIORARI FILED JUNE 3, 2011
CERTIORARI GRANTED SEPTEMBER 27, 2011

Library of Congress
Law Library

TABLE OF CONTENTS

Page

Docket Report for the United States Court of Appeals for the Ninth Circuit 1

Docket Report for the United States District Court for the Northern Mariana Islands 10

Complaint and Summons 32

Defendant's Answer to Plaintiff's Complaint 36

Bill of Costs 39

Amended Affidavit to Bill of Costs 104

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Court of Appeals Docket #: 09-15212
Nature of Suit: 4360 Other Personal Injury
Kouichi Taniguchi v. Kan Pacific Saipan, Ltd.
Appeal From: U.S. District Court for the Northern Mariana Islands, Saipan

Docketed: 02/02/2009
Termed: 03/08/2011

KOUICHI TANIGUCHI Plaintiff – Appellant,	Douglas F. Cushnie Direct: 670-234-6830 [COR LD NTC Retained] LAW OFFICES OF DOUGLAS F. CUSHNIE PO Box 500949 Saipan, MP 96950
v.	
KAN PACIFIC SAIPAN, LTD., doing business as Mariana Resort and Spa Defendant – Appellee,	Richard Wilcox Pierce Direct: 670-235-3425 [COR LD NTC Retained] Richard W. Pierce Law Office LLC P.O. Box 503514 Saipan, MP 96960 Thomas Lynn Roberts, Esquire, Attorney Direct: 671-646-1222 [COR LD NTC Retained] DOOLEY ROBERTS & FOWLER LLP

Suite 201
Orlean Pacific Plaza
865 S. Marine Dr.
Tamuning, GU 96913

KOUICHI TANIGUCHI
Plaintiff – Appellant,

v.

KAN PACIFIC SAIPAN, LTD., doing business as Mariana Resort and Spa
Defendant – Appellee,

02/02/2009	1 11 pg, 246.85 KB	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND CADS: No. The schedule is set as follows: Designation of RT for Appellant Kouichi Taniguchi due 02/06/2009. Designation of RT for Appellee Kan Pacific Saipan, Ltd. due 02/17/2009. Transcript order for Appellant Kouichi Taniguchi due 02/26/2009. Certificate of record due 03/05/2009. Appellant Kouichi Taniguchi opening brief due 05/14/2009. Appellee Kan Pacific Saipan, Ltd. answering brief due 06/15/2009. Appellant's optional reply brief is due 14 days after service of the

		answering brief. (EB)
02/02/2009	2 15 pg, 862.4 KB	Filed Appellant Kouichi Taniguchi Civil Appeals Docketing Statement. Served on 01/27/2009. (EB)
03/10/2009	3 8 pg, 76.87 KB	Filed order MEDIATION (BS): This case is under consideration for inclusion in the Mediation Program. A settlement assessment conference will be held by telephone on March 31, 2009, at 4:00 p.m. Pacific Time (April 1, 2009, at 9:00 a.m. Saipan Time). The briefing schedule previously set by the court remains in effect. (AF)
03/18/2009	4 1 pg, 22.72 KB	Filed order MEDIATION (CLB): At the request of counsel for appellee, the assessment conference, originally scheduled for March 31, 2009, is continued to April 7, 2009, at 4:00 p.m. Pacific Time (April 8, 2009, at 9:00 a.m. Saipan Time). (AF)
03/18/2009	5 1 pg, 65.79 KB	Filed notice of order of transcript. Date reporter transcript ordered:. Expected payment date:. Number of pages:. Expected completion date: No transcript

		designated. (EL)
03/23/2009	6 10 pg, 737.09 KB	Filed certificate of record on appeal. RT filed in DC 3/9/09 (EL)
04/09/2009	7 1 pg, 21.5 KB	Filed order MEDIATION (CLB): Within 21 days of the filing date of this order, counsel for appellant shall contact counsel for appellee and the undersigned. (AF)
05/01/2009	8 1 pg, 26.35 KB	Filed order MEDIATION (CLB): The court has determined that this appeal will not be selected for inclusion in the Mediation Program. The briefing schedule previously set by the court is amended as follows: appellant shall file an opening brief on or before May 26, 2009; appellee shall file an answering brief on or before June 25, 2009; appellant may file an optional reply brief within fourteen (14) days from the service date of the answering brief. (AF)
05/21/2009	9 24 pg, 119.12	Submitted (ECF) Opening brief for review. Submitted by Appellant Kouichi Taniguchi.

	KB	Date of service: 05/21/2009. [6929737] (DFC)
05/22/2009	1 pg, 26.66 KB	Filed clerk order: Opening Brief [9] filed by Kouichi Taniguchi. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Blue cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. (LA)
05/26/2009	10	Attorney Tim Roberts in 09-15212 substituted by Attorney Thomas Lynn Roberts in 09-15212 (per phone request by atty) (MA)
05/26/2009	11	Filed Appellant Kouichi Taniguchi excerpts of record in 1 volume. Served on 05/21/2009 (WP)
06/01/2009	12	Received 10 paper copies of Opening brief [9] filed by Kouichi Taniguchi in 09-15212. One copy to Case Files, the remainder to Records. (SD)
06/23/2009	13	Submitted (ECF) Answering

	32 pg, 76.59 KB	brief for review. Submitted by Appellee Kan Pacific Saipan, Ltd.. Date of service: 06/24/2009. [6966770]--[COURT UPDATE: Replaced PDF with searchable version. 07/01/2009 by ASW] (TLR)
06/26/2009	14	ENTRY UPDATED. [6973732] — [Edited 10/08/2010 by WP] Filed Appellee Kan Pacific Saipan, Ltd. excerpts of record in 1 volume. Served on 06/23/2010. [6973732] (WP)
07/02/2009	15 1 pg, 27.45 KB	Filed clerk order: Answering Brief [13] filed by Kan Pacific Saipan, Ltd. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Red cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [6978182] (WP)
07/02/2009	18	Received 10 paper copies of Answering brief [13] filed by Kan Pacific Saipan, Ltd. in 09-15212. One copy to Case Files, the remainder to

		Records. [6989333] (SD)
07/06/2009	16 14 pg, 90.79 KB	Submitted (ECF) Reply brief for review. Submitted by Appellant Kouichi Taniguchi. Date of service: 07/07/2009. [6982388] (DFC)
07/08/2009	17 1 pg, 27.56 KB	Filed clerk order: Reply Brief [16] filed by Kouichi Taniguchi. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Grey cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [6985143] (WP)
07/13/2009	19	Filed Appellant Kouichi Taniguchi excerpts of record in 1 volume. Served on 07/08/2009. [6994998] (WP)
07/17/2009	20	Received 10 paper copies of Reply brief [16] filed by Kouichi Taniguchi in 09-15212. One copy to Case Files, the remainder to Records. [6995940] (SD)
08/23/2010	21 5 pg,	Notice of Oral Argument on OCTOBER 14 Calendar.

	73.55 KB	Please return ACKNOWLEDGMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Attention: The Notice of Docket Activity may not list your case number. Please open attached documents to view details about your case. [7448240] (AM)
10/14/2010	22	ARGUED AND SUBMITTED TO MICHAEL DALY HAWKINS, M. MARGARET MCKEOWN and JOHNNIE B. RAWLINSON. [7508374] (DR)
03/08/2011	23 13 pg, 426.43 KB	FILED OPINION (MICHAEL DALY HAWKINS, M. MARGARET MCKEOWN and JOHNNIE B. RAWLINSON) AFFIRMED. Judge: JBR Authoring. FILED AND ENTERED JUDGMENT. [7671981] (RP)
03/08/2011	24 4 pg, 50.54 KB	Filed memorandum (MICHAEL DALY HAWKINS, M. MARGARET MCKEOWN and JOHNNIE B. RAWLINSON) AFFIRMED. [7671987] (RP)
03/19/2011	25 9 pg, 1.3	Filed (ECF) Appellant Kouichi Taniguchi petition

	MB	for panel rehearing (from 03/08/2011 memorandum). Date of service: 03/19/2011. [7687647] (DFC)
05/11/2011	26 1 pg, 21.12 KB	Filed order (MICHAEL DALY HAWKINS, M. MARGARET MCKEOWN and JOHNNIE B. RAWLINSON) The panel has voted to deny the Petition for Panel Rehearing. Appellant's Petition for Panel Rehearing, filed on March 19, 2011, is DENIED. [7748250] (SM)
05/20/2011	27 1 pg, 6.81 KB	MANDATE ISSUED. (MDH, MMM and JBR) [7760236] (RR)
06/07/2011	28 1 pg, 41.93 KB	Received notice from the Supreme Court: petition for certiorari filed on 06/03/2011 and placed on the docket 06/06/11. Supreme Court Number 10-1472. [7777552] (RR)
09/27/2011	29 1 pg, 44.19 KB	Received notice from the Supreme Court. Petition for certiorari GRANTED on 09/27/2011. Supreme Court Number 10-1472. [7908144] (RR)

U.S. DISTRICT COURT
NORTHERN MARIANA ISLANDS (NMI)
CIVIL DOCKET FOR CASE #: 1:08-CV-00008

Taniguchi v. Kan Pacific Saipan, Ltd. Assigned to: Alex R. Munson Cause: 28:1332 Diversity-Personal Injury	Date Filed: 02/11/2008 Date Terminated: 01/08/2009 Jury Demand: Plaintiff Nature of Suit: 360 P.I.: Other Jurisdiction: Diversity

Plaintiff

Kouichi Taniguchi	represented by	**Douglas F. Cushnie** Douglas F. Cushnie, Law Offices P.O. Box 500949 Saipan, MP 96950 (670) 234-6830/6843 Fax: (670) 234-9723 Email: Abogados@pticom.com *LEAD ATTORNEY ATTORNEY TO*

BE NOTICED

V.

Defendant

Kan Pacific Saipan, Ltd.
doing business as
Mariana Resort and Spa

represented by **Tim Roberts**
Dooley Roberts & Fowler LLP
Suite 201, Orlean Pacific Plaza
86 South Marine Corps Drive
Tamuning, GU 96913
(671) 646-1222
Fax: (671) 646-1223
Email: roberts@guamlawoffice.com
LEAD ATTORNEY ATTORNEY TO BE NOTICED

Richard W. Pierce
Law Office of Richard W. Pierce
Alexander Building, 2nd Floor
P.O. Box 503514
Saipan, MP 96950
(670) 235-3425
Fax: (670) 235-3427
Email: rwpierce@saipan.c

om
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
02/11/2008	*1*	COMPLAINT against Kan Pacific Saipan, Ltd. with Jury Demand (Filing Fee: $350.00, Receipt Number: 09141.), filed by Kouichi Taniguchi. (TPM) (Entered: 02/11/2008)
02/11/2008		Summons Issued as to Kan Pacific Saipan, Ltd. (TPM) (Entered: 02/11/2008)
02/28/2008	2	ANSWER to Complaint by Kan Pacific Saipan, Ltd.. Related document: 1 Complaint filed by Kouichi Taniguchi. (Pierce, Richard) (Entered: 02/28/2008)
02/28/2008	3	ORDER RE: Case Management Conference set for 3/21/2008 09:30 AM in Chambers before Chief Judge Alex R. Munson. Signed by Chief Judge Alex R. Munson on 2/28/08. (FMC) (Entered: 02/28/2008)
03/16/2008	4	INITIAL Disclosures by Kouichi Taniguchi. (Cushnie, Douglas) (Entered: 03/16/2008)
03/16/2008	5	CASE Management Conference Statement by Kouichi Taniguchi. (Cushnie, Douglas) (Entered: 03/16/2008)
03/17/2008	6	INITIAL Disclosures by Kan Pacific

Date Filed	#	Docket Text
		Saipan, Ltd.. (Pierce, Richard) (Entered: 03/17/2008)
03/17/2008	7	CASE Management Conference Statement by Kan Pacific Saipan, Ltd.. (Pierce, Richard) (Entered: 03/17/2008)
03/21/2008	8	ORDER Rescheduling 7 Case Management Conference. Signed by Chief Judge Alex R. Munson on 03/21/2008. (TVW) (Entered: 03/21/2008)
03/21/2008		Reset Hearings: Scheduling Conference set for 4/9/2008 09:00 AM in Courtroom before Chief Judge Alex R. Munson. (TVW) (Entered: 03/21/2008)
03/31/2008	9	STIPULATION re Set/Reset Hearings *Stipulation Re: Potential Conflict* by Kan Pacific Saipan, Ltd.. (Pierce, Richard) (Entered: 03/31/2008)
04/09/2008	10	CASE Management Scheduling Order: Amended Pleadings due by 7/1/2008. Joinder of Parties due by 7/1/2008. Plaintiffs Expert Disclosure due by 8/1/2008. Defendants Expert Disclosure due by 9/1/2008. Discovery due by 9/1/2008. Status Conference set for 9/26/2008 09:00 AM in Courtroom before Chief Judge Alex R. Munson. Plaintiffs Rebuttal Expert

Date Filed	#	Docket Text
		Disclosure due by 10/1/2008. Defendants Rebuttal Expert Disclosure Deadline due by 10/15/2008. Expert Discovery due by 10/31/2008. Dispositive Motions due by 12/4/2008. Settlement Conference set for 12/19/2008 09:30 AM in Courtroom before Chief Judge Alex R. Munson. Proposed Pretrial Order due by 1/9/2009. Final Pretrial Conference set for 1/16/2009 09:00 AM in Courtroom before Chief Judge Alex R. Munson. Jury Trial set for 3/2/2009 09:00 AM in Courtroom before Chief Judge Alex R. Munson. Signed by Chief Judge Alex R. Munson on 04/09/2008. (TVW) (Entered: 04/09/2008)
04/09/2008		Minute Entry for proceedings held before Chief Judge Alex R. Munson: Case Management Conference held on 4/9/2008. Douglas Cushnie appeared for Plaintiff. Richard Pierce appeared for Defendant. (FMC) (Entered: 04/09/2008)
07/07/2008	11	MOTION to Compel Richard W. Pierce appearing for Defendant Kan Pacific Saipan, Ltd. (Attachments: #1 Memorandum, #2 Certificate of Compliance, #3 Declaration of Counsel, #4 Notice of Motion) (Pierce, Richard) (Entered:

Date Filed	#	Docket Text
		07/07/2008)
07/16/2008	12	Plaintiff's RESPONSE to 11 MOTION to Compel Production of Documents, filed by Kouichi Taniguchi. (ACH) (Entered: 07/17/2008)
07/21/2008		Set Hearing: re 11 MOTION to Compel - Motion Hearing set for 8/28/2008 09:00 AM in Courtroom before Chief Judge Alex R. Munson. (ACH) (Entered: 07/21/2008)
07/22/2008	13	RESPONSE in Opposition re 11 MOTION to Compel, 12 Response to Motion, REPLY to Response to Motion filed by Kan Pacific Saipan, Ltd.. (Pierce, Richard) (Entered: 07/22/2008)
07/29/2008	14	REPLY to Response to Motion re 11 MOTION to Compel, Set/Reset Hearings, 12 Response to Motion, 13 Response in Opposition to Motion, Reply to Response to Motion filed by Kan Pacific Saipan, Ltd.. (Pierce, Richard) (Entered: 07/29/2008)
08/27/2008	15	MOTION for Extension of Time to Complete Discovery *Notice of Motion and Motion to Extend Defendant's Expert Disclosure Deadline and to Extend Certain Discovery Deadlines; Supporting Memorandum* Richard W. Pierce

Date Filed	#	Docket Text
		appearing for Defendant Kan Pacific Saipan, Ltd. (Pierce, Richard) (Entered: 08/27/2008)
08/28/2008	16	Minute Entry for proceedings held before Chief Judge Alex R. Munson: Motion Hearing held on 8/28/2008 re 11 MOTION to Compel filed by Kan Pacific Saipan, Ltd.. (Court Reporter SNS) (ACH) (Entered: 08/28/2008)
08/28/2008	17	ORDER Granting Defendant's 11 Motion to Compel. Signed by Chief Judge Alex R. Munson on 08/28/08. (ACH) (Entered: 08/28/2008)
08/28/2008	18	Emergency MOTION for Extension of Time to Complete Discovery *Under Local Rule 7.1.h.3(b) for Order Shortening Time to Hear Defendant's Amended Motion to Extend Defendant's Expert Disclosure Deadline and to Extend Certain Other Deadlines* Richard W. Pierce appearing for Defendant Kan Pacific Saipan, Ltd. (Pierce, Richard) (Entered: 08/28/2008)
08/28/2008	19	MOTION to Amend/Correct 18 Emergency MOTION for Extension of Time to Complete Discovery *Under Local Rule 7.1.h.3(b) for Order Shortening Time to Hear Defendant's Amended Motion to Extend Defendant's Expert*

Date Filed	#	Docket Text
		Disclosure Deadline and to Extend Certain Other Deadlines Emergency MOTION for Extension of Time to Complete Discovery *Under Local Rule 7.1.h.3(b) for Order Shortening Time to Hear Defendant's Amended Motion to Extend Defendant's Expert Disclosure Deadline and to Extend Certain Other Deadlines*, 15 MOTION for Extension of Time to Complete Discovery *Notice of Motion and Motion to Extend Defendant's Expert Disclosure Deadline and to Extend Certain Discovery Deadlines; Supporting Memorandum Notice of Motion and Amended Motion to Extend Defendant's Expert Disclosure Deadline and to Extend Certain Other Deadlines; Supporting Memorandum* Richard W. Pierce appearing for Defendant Kan Pacific Saipan, Ltd. (Pierce, Richard) (Entered: 08/28/2008)
08/28/2008	20	ORDER Granting Defendant's 18 Emergency Motion to Shorten Time to Hear Defendant's Amended Motion to Extend Defendant's Expert Disclosure Deadline and to Extend Certain Other Deadlines. Signed by Chief Judge Alex R. Munson on 08/28/08. (ACH) (Entered: 08/28/2008)

Date Filed	#	Docket Text
08/28/2008		Set Hearings: re 15 Motion to Extend Defendant's Expert Disclosure Deadline and to Extend Certain Discovery Deadlines; Supporting Memorandum - Motion Hearing set for 8/29/2008 09:00 AM in Courtroom before Chief Judge Alex R. Munson. (ACH) (Entered: 08/28/2008)
08/29/2008	21	Minute Entry for proceedings held before Chief Judge Alex R. Munson: Motion Hearing held on 8/29/2008 re 18 Emergency MOTION for Extension of Time to Complete Discovery *Under Local Rule 7.1.h.3(b) for Order Shortening Time to Hear Defendant's Amended Motion to Extend Defendant's Expert Disclosure Deadline and to Extend Certain Other Deadlines* Emergency MOTION for Extension of Time to Complete Discovery *Under Local Rule 7.1.h.3(b) for Order Shortening Time to Hear Defendant's Amended Motion to Extend Defendant's Expert Disclosure Deadline and to Extend Certain Other Deadlines* filed by Kan Pacific Saipan, Ltd.. (Court Reporter SNS) (ACH) (Entered: 08/29/2008)
09/02/2008	22	ORDER Following Hearing on 15 Motion to Extend Defendant's

Date Filed	#	Docket Text
		Expert Disclosure Deadline and to Extend Certain Other Deadlines. Signed by Chief Judge Alex R. Munson on 09/02/08. (ACH) (Entered: 09/02/2008)
10/24/2008	23	ORDER Imposing Sanctions on Plaintiff's Attorney. Signed by Chief Judge Alex R. Munson on 10/24/08. (ACH) (Entered: 10/24/2008)
11/17/2008	24	MOTION for Summary Judgment *[Partial]* Douglas F. Cushnie appearing for Plaintiff Kouichi Taniguchi Responses due by 12/4/2008 (Attachments: #1 Memorandum, #2 Declaration, #3 Exhibit—Request For Production, #4 Ex.—Request For Production—2, #5 Taniguchi Dep. Tr. [Partial], #6 Taniguchi Depo. Tr. [Partial]) (Cushnie, Douglas) (Entered: 11/17/2008)
11/18/2008	25	MOTION for Summary Judgment *Defendant's Notice of Motion and Motion for Summary Judgment on Punitive Damages Claim* Richard W. Pierce appearing for Defendant Kan Pacific Saipan, Ltd. (Attachments: #1 Defendant's Memorandum of Points and Authorities in Support of Motion for Summary Judgment on Punitive Damages Claim, #2 Affidavit Declaration of Mamoru Watanabe,

Date Filed	#	Docket Text
		#3 Affidavit Declaration of Tim Roberts, Esq., #4 Exhibit Exhibit 1 to Roberts Declaration, #5 Exhibit Exhibit 2 to Roberts Declaration, #6 Proposed Findings of Uncontroverted Fact (Punitive Damages Issue)) (Pierce, Richard) (Entered: 11/18/2008)
11/18/2008	26	OPPOSITION to Motion re 24 MOTION for Summary Judgment *[Partial]* MOTION for Summary Judgment *[Partial] Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment and Cross Motion for Summary Judgment* filed by Kan Pacific Saipan, Ltd.. (Pierce, Richard) (Entered: 11/18/2008)
11/20/2008	27	MOTION to Dismiss *Defendant's Notice of Motion and Motion for Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims)* Richard W. Pierce appearing for Defendant Kan Pacific Saipan, Ltd. (Attachments: #1 Defendant's Memorandum of Points and Authorities in Support of Motion for Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims), #2

Date Filed	#	Docket Text
		Declaration of Tim Roberts, #3 Exhibit A – Declaration of Tim Roberts, #4 Exhibit B to E – Declaration of Tim Roberts, #5 Exhibit F to K – Declaration of Tim Roberts, #6 Declaration of Colin P A Jones, #7 Proposed Findings of Uncontroverted Fact (on Motion for Summary Judgment on Plaintiff's Contract Claims)) (Pierce, Richard) (Entered: 11/20/2008)
11/21/2008		Set Hearings: Motion Hearing is set for 12/18/2008 09:00 AM in Courtroom before Chief Judge Alex R. Munson. (TVW) (Entered: 11/21/2008)
11/27/2008	28	MOTION for Sanctions Douglas F. Cushnie appearing for Plaintiff Kouichi Taniguchi (Attachments: #1 Memorandum, #2 Motion To For Order To Shorten Time, #3 Declaration) (Cushnie, Douglas) (Entered: 11/27/2008)
12/01/2008	29	ORDER Granting 28 Motion to Shorten Time, Setting Briefing Schedule, and Setting Hearing Date. Signed by Chief Judge Alex R. Munson on 12/01/08. (TVW) (Entered: 12/01/2008)
12/04/2008	30	RESPONSE in Opposition re 27 MOTION to Dismiss *Defendant's Notice of Motion and Motion for*

Date Filed	#	Docket Text
		Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims) MOTION to Dismiss *Defendant's Notice of Motion and Motion for Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims)* MOTION to Dismiss *Defendant's Notice of Motion and Motion for Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims)* MOTION to Dismiss *Defendant's Notice of Motion and Motion for Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims)* filed by Kouichi Taniguchi. (Cushnie, Douglas) (Entered: 12/04/2008)
12/08/2008	31	OPPOSITION to Motion re 27 MOTION to Dismiss *Defendant's Notice of Motion and Motion for Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims)* MOTION to Dismiss *Defendant's Notice of Motion and Motion for*

Date Filed	#	Docket Text
		Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims) MOTION to Dismiss *Defendant's Notice of Motion and Motion for Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims)* MOTION to Dismiss *Defendant's Notice of Motion and Motion for Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims)* filed by Kouichi Taniguchi. (Attachments: #1 Exhibit Taniguchi Tr.1, #2 Exhibit Taniguchi Tr.3, #3 Exhibit Taniguchi Tr.4, #4 Exhibit Taniguchi Tr.2, #5 Exhibit Taniguchi Tr.5) (Cushnie, Douglas) (Entered: 12/08/2008)
12/11/2008	32	REPLY to Response to Motion re 27 MOTION to Dismiss *Defendant's Notice of Motion and Motion for Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims)* MOTION to Dismiss *Defendant's Notice of Motion and Motion for*

Date Filed	#	Docket Text
		Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims) MOTION to Dismiss *Defendant's Notice of Motion and Motion for Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims)* MOTION to Dismiss *Defendant's Notice of Motion and Motion for Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims)* filed by Kan Pacific Saipan, Ltd.. (Pierce, Richard) (Entered: 12/11/2008)
12/14/2008	33	RESPONSE in Opposition re 27 MOTION to Dismiss *Defendant's Notice of Motion and Motion for Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims)* MOTION to Dismiss *Defendant's Notice of Motion and Motion for Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims)* MOTION to Dismiss *Defendant's Notice of Motion and Motion for*

Date Filed	#	Docket Text
		Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims) MOTION to Dismiss *Defendant's Notice of Motion and Motion for Dismissal, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine (on Plaintiff's Contract Claims)* filed by Kouichi Taniguchi. (Attachments: #1 Memorandum, #2 Affidavit Declaration, #3 Exhibit Statement of Plaintiff, #4 Exhibit Translation of Plaintiff's Statement) (Cushnie, Douglas) (Entered: 12/14/2008)
12/15/2008	34	OPPOSITION to Motion re 28 MOTION for Sanctions filed by Kan Pacific Saipan, Ltd.. (Attachments: #1 Affidavit Second Watanabe Decl) (Pierce, Richard) (Entered: 12/15/2008)
12/18/2008	35	Minute Entry for proceedings held before Chief Judge Alex R. Munson: Motion Hearing held on 12/18/2008 re 24 MOTION for Summary Judgment *[Partial]*, 25 MOTION for Summary Judgment on Punitive Damages, 27 MOTION to Dismiss, or in the Alternative, Partial Summary Judgment, or in the Alternative, Motion in Limine 28

Date Filed	#	Docket Text
		MOTION for Sanctions, 19 MOTION to Amend/Correct 18 Emergency MOTION for Extension of Time to Complete Discovery. (Court Reporter SNS) (TVW) (Entered: 12/18/2008)
12/19/2008	36	ORDER – Pretrial Conference / Settlement Conference set for 1/9/2008 is rescheduled to 1/8/2009 10:00 AM in Chambers before Chief Judge Alex R. Munson. Signed by Chief Judge Alex R. Munson on 12/19/08. (ACH) (Entered: 12/19/2008)
12/22/2008	37	Order Granting Defendant's Motion for Cross-Summary Judgment (Denying 24 Motion for Summary Judgment; finding as moot 25 Motion for Summary Judgment; finding as moot 27 Motion to Dismiss.). Signed by Chief Judge Alex R. Munson on 12/22/08. (ACH) (Entered: 12/22/2008)
12/23/2008	38	ORDER Closing File. Signed by Chief Judge Alex R. Munson on 12/23/08. (ACH) (Entered: 12/23/2008)
12/31/2008	39	BILL OF COSTS by Kan Pacific Saipan, Ltd.. (Attachments: #1 Affidavit Affid for Bill of Costs, #2 Bill of Costs, #3 Exhibits 1 and 2, #4 Exhibits 3, 4, 5, and 6 Affid Bill of

Date Filed	#	Docket Text
		Costs) (Pierce, Richard) (Entered: 12/31/2008)
12/31/2008	40	BILL OF COSTS *Amended Affidavit* by Kan Pacific Saipan, Ltd.. (Pierce, Richard) (Entered: 12/31/2008)
01/08/2009	41	ORDER Reopening Case File and Granting in Part and Denying in Part Defendant's 39 Bill of Cost. Signed by Chief Judge Alex R. Munson on 1/08/2009. (TVW) (Entered: 01/08/2009)
01/08/2009	42	JUDGMENT and Award of Costs. Signed by Chief Judge Alex R. Munson on 1/08/2009. (TVW) (Entered: 01/08/2009)
01/08/2009	43	ORDER Closing File. Signed by Chief Judge Alex R. Munson on 1/08/2009. (TVW) (Entered: 01/08/2009)
01/13/2009	44	MOTION for Bill of Costs *Motion Objecting to Taxing of Costs* Douglas F. Cushnie appearing for Plaintiff Kouichi Taniguchi (Attachments: #1 Memorandum) (Cushnie, Douglas) (Entered: 01/13/2009)
01/15/2009	45	ORDER Denying Plaintiff's 44 Motion Objecting To Costs. Signed by Chief Judge Alex R. Munson on 1/15/2009. (TVW) (Entered: 01/15/2009)
01/27/2009	46	NOTICE OF APPEAL as to 42

Date Filed	#	Docket Text
		Judgment and Award of Costs, 37 Order Granting Defendant's Motion for Cross-Summary Judgment, 41 Order Re-opening Case File and Granting in Part and Denying in Part Defendant's Bill of Cost, filed by Kouichi Taniguchi. Filing fee $455, Receipt Number MPX100000515. (TPM) (Entered: 01/27/2009)
01/27/2009	47	REPRESENTATION STATEMENT, filed by Kouichi Taniguchi. (TPM) (Entered: 01/27/2009)
01/27/2009	48	STATEMENT of Issues on Appeal Rule 10(b)(3)(A) FRAP, filed by Kouichi Taniguchi. (TPM) (Entered: 01/27/2009)
01/27/2009	49	CERTIFICATE Re Transcript on Appeal Rule 10(b)(1)(B) FRAP Circuit Rule 10-3.1 (a), filed by Kouichi Taniguchi. (TPM) (Entered: 01/27/2009)
01/28/2009	50	TRANSCRIPT REQUEST and Designation Form filed by Kouichi Taniguchi. (TVW) (Entered: 01/28/2009)
02/13/2009	51	STATUS REPORT *APPLICATION FOR ORDER IN AID* by Kan Pacific Saipan, Ltd.. (Pierce, Richard) (Entered: 02/13/2009)
02/17/2009	52	ORDER to Show Cause Why Plaintiff Should Not be Found in

Date Filed	#	Docket Text
		Contempt and Setting Hearing in Aid of Judgment. Show Cause Hearing is set for 2/27/2009 08:00 AM in Courtroom before Chief Judge Alex R. Munson. Signed by Chief Judge Alex R. Munson on 02/17/2009. (TVW) (Entered: 02/17/2009)
02/22/2009	53	MOTION Telephonic Hearing Douglas F. Cushnie appearing for Plaintiff Kouichi Taniguchi (Attachments: #1 Affidavit) (Cushnie, Douglas) (Entered: 02/22/2009)
02/23/2009	54	ORDER RE: Show Cause Hearing. Signed by Chief Judge Alex R. Munson on 2/23/09. (ACH) Modified on 3/20/2009 (ACH). (Entered: 02/23/2009)
02/23/2009		Terminate Motion: 53 Motion Motion to Appear Telephonically. (TPM) (Entered: 10/20/2011)
02/27/2009	55	Minute Entry for proceedings held before Chief Judge Alex R. Munson: Show Cause Hearing held on 2/27/2009. (Court Reporter PAG) (ACH) (Entered: 02/27/2009)
02/27/2009	56	NOTICE of Continued Hearing and ORDER Show Cause Hearing set for 3/20/2009 08:30 AM in Courtroom before Chief Judge Alex R. Munson. Signed by Chief Judge

Date Filed	#	Docket Text
		Alex R. Munson on 2/27/09. (ACH) (Entered: 02/27/2009)
03/15/2009	57	MOTION for Reconsideration *Motion To Reconsider Denial of Stay* Douglas F. Cushnie appearing for Plaintiff Kouichi Taniguchi (Attachments: #1 Memorandum, #2 Motion For Order To Shorten Time) (Cushnie, Douglas) (Entered: 03/15/2009)
03/17/2009		Set Hearing: re 57 MOTION for Reconsideration *Motion To Reconsider Denial of Stay* – Motion Hearing set for 3/20/2009 09:00 AM in Courtroom before Chief Judge Alex R. Munson. (ACH) (Entered: 03/17/2009)
03/18/2009	58	OPPOSITION to Motion re 57 MOTION for Reconsideration *Motion To Reconsider Denial of Stay* filed by Kan Pacific Saipan, Ltd.. (Pierce, Richard) (Entered: 03/18/2009)
03/19/2009	59	ORDER Denying Plaintiff's 57 Motion to Shorten Time and Motion for Reconsideration. Signed by Chief Judge Alex R. Munson on 03/19/2009. (TVW) (Entered: 03/19/2009)
03/20/2009	60	Minute Entry for proceedings held before Chief Judge Alex R. Munson: Motion for a Show Cause Hearing

Date Filed	#	Docket Text
		held on 3/20/2009. (Court Reporter PAG) (TVW) (Entered: 03/20/2009)
03/20/2009	61	ORDER in Aid of Judgment. Signed by Chief Judge Alex R. Munson on 03/20/09. (ACH) (Entered: 03/20/2009)
05/06/2009	62	ORDER of United States Court of Appeals, filed on 04/09/2009, re 46 Notice of Appeal, filed by Kouichi Taniguchi. (ACH) (Entered: 05/06/2009)
05/06/2009	63	ORDER of United States Court of Appeals, filed on 05/01/2009 re 46 Notice of Appeal, filed by Kouichi Taniguchi. (ACH) (Entered: 05/06/2009)
03/09/2011	64	OPINION of United States Court of Appeals re 46 Notice of Appeal. (ACH) (Entered: 03/09/2011)
03/09/2011	65	MEMORANDUM of United States Court of Appeals re 46 Notice of Appeal. (Affirmed) (ACH) (Entered: 03/09/2011)
05/23/2011	66	MANDATE of USCA as to 46 Notice of Appeal, filed by Kouichi Taniguchi. (ACH) (Entered: 05/23/2011)

Douglas F. Cushnie
P.O. Box 500949
Saipan MP 96950
Telephone: (670) 234-6830
Facsimile: (670) 234-9723
E mail: abogados@opticom.com
Attorney for Plaintiff

FILED
Clerk
District Court
FEB 11 2008
For The Northern Mariana Islands
By
(Deputy Clerk)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

KOUICHI TANIGUCHI,	)	CIVIL ACTION
	)	NO. 08-0008
Plaintiff,	)	
	)	COMPLAINT
vs.	)	and
	)	SUMMONS
KAN PACIFIC SAIPAN, LTD.,	)	
dba Mariana Resort and Spa,	)	
Defendant.	)	

Comes now Kouichi Taniguchi, plaintiff herein, and for this his complaint states and alleges:

1. That this court has jurisdiction of this action pursuant to 28 U.S.C. § 1332, this being an action under the diversity jurisdiction of this court with the amount in controversy exceeding $75,000.00 exclusive of interest and costs.

2. That plaintiff Kouichi Taniguchi is a citizen and resident of the country of Japan; defendant Kan

Pacific Saipan, Ltd., is a corporation incorporated under the laws of and doing business within the Commonwealth of the Northern Mariana Islands, as Mariana Resort and Spa.

3. That Kouichi Taniguchi was a paying guest, patron and business invitee at the defendant's hotel and spa on November 6, 2006.

4. That on that date, while standing on a wooden deck area at defendant's hotel and spa, overlooking pools and the ocean, the deck collapsed under him, immediately causing him to drop several feet to the ground below.

5. That as a result of the collapsing deck, plaintiff suffered various, cuts, bruises, and ligament tears.

6. That plaintiff is a professional baseball player, having played in Japan for the Yomiuri (Tokyo) Giants and in the United States for the New York Mets.

7. That due to his fame and reputation in Japan he is in demand for public appearances, conducting of baseball clinics, advertising employer's business activities, all of which has resulted in his receiving various contracts from business entities in Japan to appear on their behalf, play baseball for them and promote products and businesses both in Japan and the Commonwealth.

8. That as a result of his injury plaintiff has incurred medical, hospital and rehabilitation expenses and has not been able to fulfill various contractual requirements causing a loss of income and in some cases requiring the return of advance payments, all to be established at trial.

9. That the injury has caused plaintiff great physical pain, and anxiety that he cannot fulfill contractual requirements and engage in the physical activity he has spent most of his life perfecting.

10. That the collapse of the deck and resulting injury to plaintiff was due to the failure of defendant to properly construct, maintain and keep the area in good order and repair, said area being under defendant's sole authority, management and control.

11. The defective and hazardous condition of the deck area was not visible to guests using the area and plaintiff had no reason to believe that the area was dangerous, defendant leaving the area unguarded and without any signal or warning as to the defective and hazardous condition.

12. That defendant's conduct as alleged hereinabove was the direct and proximate cause of plaintiff's physical and emotional injuries and financial loss.

13. That defendant's failure to inspect, maintain, and repair the deck area to which it invited its guests, and business invitees constituted a wilful disregard for the safety of its business invitees and guests such as plaintiff, entitling plaintiff to punitive damages in such amounts as may be established at trial.

WHEREFORE, plaintiff prays as follows:

1. Damages for pain, suffering, and emotional anxiety arising out of his injury.

2. Compensation for medical, hospital, and rehabilitation expenses.

3. Damages for loss of income including for advance fees returned.

4. Punitive damages.

5. Such other and further relief as the court may deem proper.

Dated this 8th day of February, 2008.

DOUGLAS F. CUSHNIE
Attorney for Plaintiff
/s/
Douglas F. Cushnie F 108

JURY DEMAND

Plaintiff demands trial by jury on all issues so triable.

Richard W. Pierce, Esq.
Richard W. Pierce Law Office, LLC
P.O. Box 503514 CK
Saipan MP 96950-3514
Tel: 670/235-3425; Fax: 670/235-3427

Tim Roberts, Esq.
Dooley Roberts & Fowler LLP
Suite 201, Orlean Pacific Plaza
865 South Marine Corps Drive
Tamuning, Guam 96913
Telephone: (671) 646-1222; Fax: (671) 646-1223

Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

KOICHI TANIGUCHI	)	CIVIL ACTION NO.
	)	08-0008
Plaintiff,	)	
vs.	)	
KAN PACIFIC	)	**DEFENDANT'S**
SAIPAN, LTD. dba	)	**ANSWER TO**
Mariana Resort and spa	)	**PLAINTIFF'S**
	)	**COMPLAINT**
Defendant.	)	

Comes now Defendant KAN PACIFIC SAIPAN, LTD. dba Mariana Resort and Spa ("Mariana Resort"), and for its Answer to Plaintiff's Complaint states as follows:

1. Mariana Resort admits the allegations contained in paragraph 1 of Plaintiff's complaint.

2. Mariana Resort admits the allegations contained in paragraph 2 of Plaintiff's complaint.

3. Responding to the allegations contained in Paragraph 3 of Plaintiff's complaint, Mariana Resort admits that Plaintiff was present at its business premises on November 6, 2006, but denies the remainder of the allegations set forth therein.

4. Responding to the allegations contained in Paragraph 4 of Plaintiff's complaint, Mariana Resort admits that on November 6, 2006, Plaintiff's foot went through a portion of defendant's wooden deck, but denies the remainder of the allegations set forth therein.

5. Mariana Resort denies the allegations contained in paragraph 5 of Plaintiff's complaint.

6. Responding to the allegations contained in Paragraph 6 of Plaintiff's complaint, Mariana Resort denies that Plaintiff is currently a professional baseball player, but admits the remainder of the allegations set forth therein.

7. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the matters stated in paragraph 7 of Plaintiff's complaint, and on that ground denies the same.

8. Mariana Resort denies the allegations contained in paragraph 8 of Plaintiff's complaint.

9. Mariana Resort denies the allegations contained in paragraph 9 of Plaintiff's complaint.

10. Mariana Resort denies the allegations contained in paragraph 10 of Plaintiff's complain.

11. Mariana Resort denies the allegations contained in paragraph 11 of Plaintiff's complaint.

12. Mariana Resort denies the allegations contained in paragraph 12 of Plaintiff's complaint.

13. Mariana Resort denies the allegations contained in paragraph 13 of Plaintiff's complaint.

AFFIRMATIVE DEFENSES

1. The complaint fails to state a claim upon which relief can be granted.

2. If Mariana Resort was negligent, which it denies, Plaintiff was contributorily negligent, and his damages must be reduced by the percentage of negligence assigned to him by the jury.

3. Plaintiff failed to mitigate his losses and damages.

WHEREFORE, Mariana Resort prays for relief as follows:

1. For an order that Plaintiff take nothing by his complaint, and that it be dismissed with prejudice;

2. For costs of suit.

RICHARD W. PIERCE LAW OFFICE, LLC

Dated: 2/28/08 By: /s/ Richard Pierce
RICHARD PIERCE

DOOLEY ROBERTS & FOWLER LLP

Dated: 2/28/08 By: /s/ Tim Roberts
TIM ROBERTS

Attorneys for Defendant KAN PACIFIC SAIPAN, LTD. dba Mariana Resort and Spa.

AO 133 (Rev. 11/08) Bill of Costs

UNITED STATES DISTRICT COURT
for the
District of Northern Mariana Islands

KOICHI TANIGUCHI,	)	
v.	)	
KAN PACIFIC SAIPAN,	)	Civil Case No. CV 08-00008
LTD. dba MARIANA	)	
RESORT and SPA,	)	

Bill of Costs

Judgment having been entered in the above entitled 12/22/2008 *Date* against **PLAINTIFF KOICHI TANIGUCHI, IN FAVOR OF DEFENDANT KAN PACIFIC SAIPAN, LTD. dba MARIANA RESORT and SPA**

the Clerk is requested to tax the following as costs:

Fees of the Clerk	$ 0.00
Fees for service of summons and subpoena.....	0.00
Fees for printed or electronically recorded transcripts necessarily obtained for use in the case	2,215.00
Fees and disbursements for printing.....	0.00

Fees for witnesses (*itemize on page two*)	6,660.32
Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case	0.00
Docket fees under 28 U.S.C. 1923	0.00
Costs as shown on Mandate of Court of Appeals	0.00
Compensation of court-appointed experts	0.00
Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828.....	5,517.20
Other costs (*please itemize*).....	1,467.52
TRAVEL TO KYOTO TO MEET AND CONFER WITH EXPERT WITNESS KOICHI YAMAZAKI	
TOTAL	$ 15,860.04

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.

Declaration

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill has been served on all parties in the following manner:

☒ Electronic service by e-mail as set forth below and/or.

☐ Conventional service by first class mail, postage prepaid as set forth below.

s/Attorney: **TIM ROBERTS, ESQ.**

Name of **DOOLEY ROBERTS AND FOWLER LLP**

For **KAN PACIFIC SAIPAN, LTD. dba MARIANA RESORT and SPA** Date: **12/31/2008**

Name of claiming party

Costs are taxed in the amount of_____ and included in the judgment.

_____ By:_____ _____

Clerk of the Court *Deputy Clerk* *Date*

AO 133 (Rev. 11/08) Bill of Costs

UNITED STATES DISTRICT COURT

Witness Fees (computation, cf. 28 U.S.C. 1821 for statutory fees)

NAME, CITY AND STATE OF RESIDENCE	ATTENDANCE		SUBSISTENCE		MILEAGE		Total Cost Each Witness
	Days	Total Cost	Days	Total Cost	Miles	Total Cost	
KOICHI YAMAZAKI, ESQ., JAPANESE ATTORNEY PRACTICING IN KYOTO, JAPAN, FOR EXPERT CONSULTATION, ADVICE, REPORT AND TESTIMONY RE: PLAINTIFF KOICHI							**6,660.32**

TANIGUCHI'S CLAIMS							
							$0.00
							$0.00
							$0.00
							$0.00
							$0.00
					TOTAL:		**$6,660.32**

NOTICE

Section 1924, Title 28, U.S. Code (effective September 1, 1948) provides:

"Sec. 1924. Verification of bill of costs."

"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

See also Section 1920 of Title 28, which reads in part as follows:

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:

Rule 54(d)(1)

Costs Other Than Attorneys' Fees.

Unless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 1 day's notice. On motion served within the next 5 days, the court may review the clerk's action.

RULE 6

(d) Additional Time After Certain Kinds of Service.

When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

RULE 58(e)

Cost or Fee Awards:

Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

Tim Roberts, Esq.
Dooley Roberts & Fowler LLP
Suite 201, Orlean Pacific Plaza
865 South Marine Corps Drive
Tamuning, Guam 96913
Telephone No. (671) 646-1222
Facsimile No. (671) 646-1223
Email: roberts@guamlawoffice.com

Attorneys for Defendant
Kan Pacific Saipan, Ltd.
dba Mariana Resort and Spa

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

KOICHI TANIGUCHI, Plaintiff, vs. KAN PACIFIC SAIPAN, LTD. dba MARIANA RESORT and SPA, Defendant.	CIVIL CASE NO. 08-00008 **AFFIDAVIT OF TIM ROBERTS, ESQ.**

I, Tim Roberts, the first duly sworn, do hereby depose and state upon my oath as follows:

1. Along with Richard Pierce, Esq., I am the attorney of record for Defendant Kan Pacific Saipan Ltd. dba Mariana Resort and Spa ("Kan Pacific") in the above captioned case.

2. This is the affidavit required by 28 USC § 1924.

3. Exhibit 1 to this affidavit is a true and correct copy is a bill of costs prepared by my office's bookkeeper, at my direction and under my supervision. On my instructions, all photocopying fees were deleted, since in my experience it is too much trouble to justify what photocopying fees were actually necessary and what were not. The remainder of the bill reflects the following costs which were incurred in the defense of Kan Pacific:

(a) Fees paid to a Japanese translator I retained specifically for this case, Colin P.A. Jones. A true and correct copy of Mr. Jones' resume and his invoices for translation services are collectively attached to this affidavit as Exhibit 2. Mr. Jones' services were invaluable to Mr. Piece and I during this case. It was, in fact, Mr. Jones who introduced me to our expert witness, Koichi Yamazaki, a Japanese lawyer practicing in Kyoto, Japan, where Mr. Jones teaches American law to Japanese students. Mr. Jones also translated for me at a meeting I had with Mr. Yamazaki in Kyoto. He did not charge for any travel time.

(b) Expert witness fees for consultation, investigation, advice, and a report, paid to Koichi Yamazaki, Esq., an attorney practicing in Kyoto, Japan. Mr. Yamazaki charged us JPY 7,000 for these services, which was $6,660.32 in U.S. dollars. Copies of Mr. Yamazaki's resume, his report, and our firm's check to him for $6,660.32 are collectively attached hereto as Exhibit 3.

(c) Air fare and hotel charges incurred on a trip to Kyoto, Japan to meet personally with Mr. Yamazaki.

Mr. Yamazaki's English, while passable in person, made it difficult for me to communicate with him over the telephone or by e-mail. In my 24 years experience practicing law on Guam and throughout Micronesia, it has been my experience that it is much easier to communicate in person with native Japanese speakers with limited English abilities, through repetition, gestures, and handwritten notes. For this reason — and because our translator Colin Jones also lives in Kyoto and translated for me at the meeting — it was necessary for me to fly to Kyoto, Japan to meet with Mr. Yamazaki. The decision on whether I would fly to Kyoto to meet with Yamazaki, or whether Mr. Yamazaki would fly to Guam for the meeting, was dictated by simple economics. I was charging $180 per hour in this case. I was informed by Colin Jones that Mr. Yamazaki's fees ordinarily exceed $400 per hour. It was therefore much less expensive for me to fly to Kyoto rather than for Mr. Yamazaki to fly to Guam. My air fare to Japan and back was $898.60, and the hotel bill was $568.92, without any reimbursement being sought for ground transportation or meals. A copy of my American Express charges for these cost items is attached hereto as Exhibit 4 in redacted form.

(d) Deposition costs incurred in connection with the deposition of Plaintiff Koichi Taniguchi on October 20, 2008. These consisted of a bill for $1,726.00 from Depo Resources, Inc. and a bill for $489.00 from Depo Resources, Inc., for a transcript of the deposition of Mr. Taniguchi. A copy of the two bills received by Depo Resources for its work is collectively attached hereto as Exhibit 5.

(e) Translation services provided by Saipan resident Kayoko Irinaka in an hourly rate of $260.00. Ms. Irinaka was the Japanese-English translator at Mr. Taniguchi's deposition. A copy of the bill we received by Ms. Irinaka is attached hereto as Exhibit 6.

Executed this 31st of December, 2008 in Tamuning, Guam.

/s/ Tim Roberts
TIM ROBERTS, ESQ.

Tamuning, Guam) ss:

On this 31st day of December, 2008, before me a Notary Public in and for Guam, personally appeared **Tim Roberts**, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the date last above written.

/s/ Jessica Kim
Notary Public

AO 133 (Rev. 11/08) Bill of Costs

UNITED STATES DISTRICT COURT
for the
District of Northern Mariana Islands

KOICHI TANIGUCHI,)
vs.)
KAN PACIFIC SAIPAN, LTD. dba MARIANA RESORT and SPA,)
Civil Case No. CV 08-00008

Bill of Costs

Judgment having been entered in the above entitled 12/22/2008 *Date* against **PLAINTIFF KOICHI TANIGUCHI, IN FAVOR OF DEFENDANT KAN PACIFIC SAIPAN, LTD. dba MARIANA RESORT and SPA**

the Clerk is requested to tax the following as costs:

Fees of the Clerk	$	0.00
Fees for service of summons and subpoena.....		0.00
Fees for printed or electronically recorded transcripts necessarily obtained for use in the case		2,215.00
Fees and disbursements for printing.....		0.00

Fees for witnesses (*itemize on page two*)	6,660.32
Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case	0.00
Docket fees under 28 U.S.C. 1923	0.00
Costs as shown on Mandate of Court of Appeals	0.00
Compensation of court-appointed experts	0.00
Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828.....	5,517.20
Other costs (*please itemize*).....	1,467.52
TRAVEL TO KYOTO TO MEET AND CONFER WITH EXPERT WITNESS KOICHI YAMAZAKI	
TOTAL	$ 15,860.04

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.

Declaration

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill has been served on all parties in the following manner:

☒ Electronic service by e-mail as set forth below and/or.

☐ Conventional service by first class mail, postage prepaid as set forth below.

s/Attorney: **TIM ROBERTS, ESQ.**

Name of **DOOLEY ROBERTS AND FOWLER LLP**

For **KAN PACIFIC SAIPAN, LTD. dba MARIANA RESORT and SPA** Date: 12/31/2008

Name of claiming party

Costs are taxed in the amount of _____ and included in the judgment.

_____ By:_____ _____

Clerk of the Court *Deputy Clerk* *Date*

THIS PAGE INTENTIONALLY LEFT BLANK

AO 133 (Rev. 11/08) Bill of Costs

UNITED STATES DISTRICT COURT

Witness Fees (computation, cf. 28 U.S.C. 1821 for statutory fees)							
NAME, CITY AND STATE OF RESIDENCE	ATTENDANCE		SUBSISTENCE		MILEAGE		Total Cost Each Witness
	Days	Total Cost	Days	Total Cost	Miles	Total Cost	
KOICHI YAMAZAKI, ESQ., JAPANESE ATTORNEY PRACTICING IN KYOTO, JAPAN, FOR EXPERT CONSULTATION, ADVICE, REPORT AND TESTIMONY RE: PLAINTIFF KOICHI TANIGUCHI'S							6,660.32

CLAIMS							
							$0.00
							$0.00
							$0.00
							$0.00
							$0.00
					TOTAL:		$6,660.32

NOTICE

Section 1924, Title 28, U.S. Code (effective September 1, 1948) provides:

"Sec. 1924. Verification of bill of costs."

"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

See also section 1920 of Title 28, which reads in part as follows:

"A bill of costs shall be filed in the case and, upon allowance, included in the

judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:

Rule 54(d)(1)

Costs Other Than Attorneys' Fees.

Unless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 1 day's notice. On motion served within the next 5 days, the court may review the clerk's action.

RULE 6

(d) Additional Time After Certain Kinds of Service.

When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

RULE 58(e)

Cost or Fee Awards:

Ordinarily, the entry of judgment may not be delayed, nor the time for appeal

extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

Dooley Roberts & Fowler LLP
Suite 201, Orlean Pacific Plaza
865 South Marine Corps Drive
Tamuning, GU 96913
www.guamlawoffice.com
(671) 646-1222
(671) 646-1223

Aioi Insurance Company, Ltd.
c/o Takagi & Associates
Suite 200, Flame Tree Plaza
540 Pale San Vitores Road
Tumon, GU 96913
Timothy C.S.A. Lujan, Vice President

December 08, 2008
Invoice No. 38588

Our File No: D109.81A
Matter: Claimant: Koichi Taniguchi
DOA: 11/06/06
Policy No: SBOP06-00057

— Cost Transactions —

		Amount
6/1/2008	Cost advanced	780.00
	Professional services rendered re: translation of contract cancellation notice into English, review of Japanese medical records, related research and communications via email with Tim Roberts (Ref: Invoice dated 06/01/08 from Collin P.A. Jones).	

Exhibit 1

		Amount
8/31/2008	Cost advanced	898.60
	Reimbursement for airfare (Ref: Check no. 12880 made payable to Thomas Roberts)	
9/30/2008	Cost advanced	6,660.32
	Professional services rendered re: Legal opinion (Ref: Check no. 12973 made payable to Koichi Yamazaki).	
	Cost advanced	568.92
	Hotel charges for Tim Roberts while in Kyoto Japan.	
	Cost advanced	1,846.00

		Amount
	Professional services rendered (Ref: Statement dated 09/30/08 from Colin P.A. Jones)	
10/28/2008	Cost advanced	1,726.00
	Deposition of Koichi Taniguchi on 10/20/08 (Ref: Invoice no. 08230 from Depo Resources).	
10/30/2008	Cost advanced	489.00
	Deposition of Koichi Taniguchi on 10/20/08 (Ref: Invoice no. 08233 made payable to Depo Resources).	
10/31/2008	Cost advanced	1,820.00
	Professional services rendered by Colin P.A. Jones (Ref: Invoice dated 10/3108).	

		Amount
11/3/2008	Cost advanced	260.00
	Translation services provided by Kayoko Irinaka (Ref: Invoice dated 11/03/08).	
12/8/2008	Cost advanced	811.20
	Professional services rendered by Colin P.A. Jones (Ref: Invoice dated 12/08/08).	
	Total Costs:	$15,860.04
	Balance due	$15,860.04

COLIN P.A. JONES
#508 Form Horikawa Imadegawa
252 Asukai-cho, Kamigyo-ku
Kyoto, Japan 602-0054
Cell: 011-81-90-8011-1919
Colin.jones@lexdoxjapan.com

Relevant Work Experience

4/08-present **Outside Director**, Manpower Japan Co., Ltd. (Japanese subsidiary of SEC-registered global human resources company).

4/05-present **Professor, Doshisha University Law School**.

- Executive Committee member since April 2008.
- Teaching classes in Anglo-American Law including Contracts and Business Law; most lectures conducted in Japanese.
- *Pro bono* activities in the area of children's rights, including seminars for Western diplomatic corps and related research.
- Since April 2008, also teaching Japanese law at Osaka University as adjunct professor.

Exhibit 2

11/02-present **Attorney, Latham & Watkins LLP.** (part-time from 8/03) General corporate finance and telecommunications practice. Focus included corporate governance and Sarbanes-Oxley compliance issues for Japanese corporations. Clients included NTT and J-Phone (now Softbank Mobile). Representative transactions include:

- Carlyle purchase of personal handyphone business from KDDI.
- Working with major US satellite provider on licensing issues in Japan.
- Working with trans-Pacific fiber-optic cable system provider in developing Japanese business operations, including licensing and fisheries negotiations.

(*See attached list for additional transactional experience*)

8/03-present **Principal – LexDox Japan.** Japan-focused documentation consultancy, including Japanese-English legal translations and related advisory services. Principal clients include Softbank Mobile, as well as a variety of other leading companies and law firms.

03/00-10/02 **General Counsel, Global Crossing Japan Corporation and Vice**

President and Assistant General Counsel, Asia Global Crossing Ltd. Handled all aspects of telecommunications business operations in Japan including regulatory and joint venture management, as well as provide regional documentation and advisory support for other Asian offices.
(*See attached list for additional transactional experience*)

09/93-02/00 **Associate, Simpson Thacher & Bartlett**

09/96-02/00 *Tokyo Office*

- Lead associate representing Goldman Sachs and Nikko Salomon as underwriters in NTT DoCoMo IPO (at the time the largest IPO in history).
- Lead associate on a variety of securities transactions for other leading Japanese companies.

02/96-09/96 *Hong Kong Office*

- Represented lender group in Central Java KSO telecom project financing.
- Worked on security offering for Telekom Malaysia.

09/93-02/96 *New York Office*

(*See attached list for additional transactional experience*)

06/92-08/92 **Summer Intern, Willkie Farr & Gallagher** (*Washington D.C. and New York*).

05/91-06/91 **Summer Intern, Legal Department, Sumitomo Metals Inc.**

Legal Qualifications

New York since April, 1994.

Guam since October, 2004.

Republic of Palau, since December 2005 (inactive).

(currently in process of qualifying as a solicitor in England and Wales)

Other Professional Affiliations

Member, Foreign Correspondents' Club of Japan
Editorial Advisor, *Doing Business in Japan*

Education

05/90-05/93 **The Duke University School of Law**

- J.D. and LL.M. (international and comparative law); high honors.
- Articles Editors, the *Duke Journal of Comparative and International Law.*
- Recipient of Judge Robert Jackson Award for Student Writing on International Law.
- Studied Islamic Law (wrote minor thesis on Islamic banking).

10/86-04/90 **Tohoku University Graduate Faculty of Law**

- LL.M., Japanese political history.
- President, Tohoku University Foreign Student's Association.
- Most course work, including master's thesis conducted in Japanese.

01/83-05/86 **The University of California, Berkeley**

- A.B., Oriental Languages and Literature.
- Dean's List.
- Includes two full years at International Christian University in Tokyo, and one semester at The University of Calgary.

Languages

Native speaker of English.

Fluent in Japanese (incl. reading and writing).

Conversational Chinese.

TRANSACTIONAL EXPERIENCE

Latham & Watkins LLP

My practice at Latham & Watkins, both full-time and part-time, has been focused primarily on corporate finance and telecommunications. I was the principal advisor on Sarbanes-Oxley related matters for several major Japanese carriers, and gave a CLE class on Sarbanes-Oxley at the time of its introduction. I also assisted in the documentation for the restructuring of a large Indonesian independent power project, consulted with numerous clients regarding Japan-focused joint ventures and other investments. I have introduced several telecommunications and other clients to the firm. As a part-time attorney at Latham I was a member of the firm's team representing the Carlyle Group in its acquisition of the PHS wireless business of KDDI. More recently I have been closely involved in the restructuring of the Japanese operations of a submarine fiber-optic cable company, and in consultations with a major international satellite provider regarding licensing issues in Japan.

Asia Global Crossing/Global Crossing

Asia Global Crossing (AGC) started out as a majority-owned joint venture of Global Crossing (GC) for its operations in the Asia Pacific region. The range of responsibilities and experience I had at AGC was both broad and rewarding. Japan was the first Asian country into which AGC expanded its operations. Accordingly, as the only AGC lawyer in Japan, not only was I at the forefront of virtually all legal and business issues arising in connection with the start-up, evolution and ongoing operations of a the foreign subsidiary of a major multinational corporation, but I

was frequently called upon to apply this experiences to new countries as the AGC network expanded throughout Asia. In addition, being bilingual and having long experience living in Japan, a significant part of my responsibilities involved acting as an intermediary between the Japanese and non-Japanese parts of the company. I was also deeply involved in the sales function for variety of wholesale and retail telecommunications and related products throughout Asia.

A partial list of matters in which I was involved in would include:

- Relationship management for several joint ventures in Japan
- Drafting and negotiating bulk capacity sales documents for customers throughout the Asian region
- Adaptation of standard form contracts for use in Japan, in Japanese.
- Obtaining necessary licenses to engage in international telecommunication business in Japan, as well as ongoing compliance
- Ongoing corporate governance for several Japanese entities
- Review disclosure documents for Asia Global Crossing IPO, participation in analyst presentations
- Review of vendor and customer contracts, licensing and non-disclosure agreements

- Negotiation of access and compensation arrangements with Japanese fisheries unions
- Oversight of permit acquisition and maintenance for network construction in Japan
- General participation in management of Japan operations as member of Japan leadership team
- Coordination with outside counsel and other AGC lawyers
- Participation in industry initiatives relating to Japanese telecommunications legislation
- Consultation on HR related matters
- General management responsibilities

While AGC/GC ultimately went into Chapter 11 and AGC went into liquidation, as a lawyer I was able to find even this part of the experience educational, as it taught me many valuable lessons that I have applied in my career since.

Simpson Thacher & Bartlett

General. At Simpson Thacher & Bartlett I gained extensive experience in a wide range of corporate finance and related matters on both transactional and ongoing bases. This experience included mergers & acquisitions, securities offerings, project financing, complex credit facilities and joint ventures.

Tokyo. Of particular note, while at the firm's Tokyo office, I was the primary associate involved in a number of securities offerings for Japanese companies. Each of these transactions required that

I do extensive research and due diligence in Japanese on corporate documents and background materials as well as detailed interviews of corporate officers. As a result, I developed detailed knowledge of each company and their respective industries. Securities offerings in which I was closely involved include:

- Toys "R" Us Japan, international IPO (2000)
- Dresdner Bank Tokyo, commercial paper program (2000)
- East Japan Railway Corporation, international equity offering (1999)
- Sanix Corporation, international equity offering (1999)
- UniCharm Corporation, international equity offering (1999)
- Leading Japanese Bank, loan securitization (1998)
- NTT DoCoMo, international IPO (1998 – at the time was the largest IPO in history)
- MegaChips Corporation, international IPO (1998)
- Sumitomo Trust Bank, international convertible debt offering (1997)
- Taisei Capital Corporation, medium term note program (ongoing)
- Kuraray Corporation, medium term note program (1997)
- Kawasaki Heavy Industries, international equity offering (1996)

- Japan Tobacco, international equity offering (1996)

While the focus of my practice at Simpson Thacher & Bartlett in Tokyo was capital markets transactions, I was also involved in a broad range of other corporate and capital markets financings, technology licensing arrangements and other ingoing and outbound investment transactions.

Hong Kong. While at the firm's Hong Kong office, I focused primarily on Asian project financing transactions, representing lenders, sponsors and developers. Transactions in which I was closely involved include:

- Tanjung Jati Power Project, Indonesia
- Paiton Power Project, Indonesia
- Central Java KSO telecom financing, Indonesia
- Quezon Power Project, The Philippines
- Riau Pulp & Power Project, Indonesia

I also was involved in securities offerings for companies such as Telekom Malaysia and China Light and Power.

New York. Participated in a broad range of the firm's corporate finance practice as a junior associate, including banking, project finance, M&A, investment company and securities transactions. While in New York I received an award from the New York Legal Aid Society for my *pro bono* work representing indigent clients in housing court.

PUBLICATIONS

(Business and Telecom Related)

- *How Compliance is Ruining Japan*, 23 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 197 (2007) (extended book review).
- *Apologies and Corporate Governance in the Japanese Context—Tatsumi Tanaka's Sonna Shazai de wa Kaisha ga Abunai (Apologizing that Way Will Endanger Your Company)*, 3 B.Y.U. INT'L L & MGMT. REV. 303 (2007) (extended book review).
- *Corporate Crime* (Co-authored with Shigeo Kifuj), JAPANESE BUSINESS LAW (Gerald McAlin ed.) (Kluwer Law International) (2007)
- *Law and Investment in Palau: A Brief Overview for Prospective Foreign Investors*, 17 INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW 49 (2007).
- Tadashi Kadokura, *Money Laundering*), 71 THE JOURNAL OF CRIMINAL LAW 88 (2007). (extended book review) *Escaping your Debts in Japan*, 23 JOURNAL OF JAPANESE LAW 259 (2007) (extended book review).
- *Japanese Regulators Finalize Regulations for Cellular Telephone Number Portability*, BNA INTERNATIONAL WORLD

COMMUNICATIONS REGULATION REPORT, January 2006.

- *Guam as a Financial Hub,* GUAM BUSINESS (4th Quarter, 2006) *International Decisions, Case No. 1231* (Case note on 2006 Japanese Supreme Court case on foreign sovereign immunity), THE AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 100 No. 4 (Oct. 2006).
- *Chinese Student Arrested for Hacking into Japanese On-Line Game* (BNA WORLD INTERNET LAW REPORT).
- *Japan Proposes Amendments to Telecom Privacy Guidelines* (publication pending in BNA WORLD TELECOM LAW REPORT).
- *Japan Outlaws Anonymous Cell Phone Usage*, BNA WORLD DATA PROTECTION REPORT, July 2005 at 14.
- *Japan Strengthens Anti-Spam Law*, BNA WORLD INTERNET LAW REPORT, July 2005 at 18.
- *Japan's New Personal Information Protection Law: Special Issues for Telecommunications Companies*, BNA WORLD TELECOM LAW REPORT, June 2005 at 18.
- *Sarbanes-Oxley and the Inch-Thick Contract*, RICHMOND JOURNAL OF GLOBAL LAW AND BUSINESS (2005).

- *Proposed Amendments to Japan's Telecommunications Business Law*, BNA WORLD TELECOM LAW REPORT, July 2003 (Co-authored with Koji Ishikawa).
- *Highlights of Proposed Amendments to Japan's Telecommunications Business Law*, LATHAM & WATKINS CLIENT ALERT Number 307, July 2, 2003 (Co-authored with Koji Ishikawa).
- *Japan's Telecommunications Business Dispute Resolution Committee*, BNA WORLD TELECOM LAW REPORT, May 2003.
- *Japan's Provider Liability Law: What it Means for ISPs and Others*, BNA WORLD INTERNET LAW REPORT, April 2003.
- *Japanese Banking Reform: A Legal Analysis of Recent Developments*, DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW [Vol. 3:387,1993].

(Other)

- 「アメリカン弁護士の思考法」("How American Lawyer's Think") – mass-market non-fiction book, publication pending in Japan.
- *Hard work begins once Japan signs child-abduction treaty*, THE JAPAN TIMES, June 3, 2008.
- *Judiciary's "snake legs" exposed*, THE JAPAN TIMES, April 29, 2008.

- *Law schools come under friendly fire*, THE JAPAN TIMES, January 29, 2008.
- 法科大学院　「法曹の脱エリート」こそが使命、朝日新聞（西日本版）2007年10月18日 (Asahi shinbun op-ed piece about future of legal profession in Japan).
- *Parental Abduction - How Will Japan Respond*, THE JAPAN TIMES (Aug. 7, 2007, p. 5).
- *No More Excuses: Why recent penal code amendments should (but probably won't) stop international parental child abduction to Japan*, 6 WHITTIER JOURNAL OF CHILD AND FAMILY ADVOCACY 351 (2007).
- *In the Best Interests of the Court: What American lawyers need to know about Child Custody and Visitation in Japan*, 8 ASIA-PACIFIC LAW AND POLICY JOURNAL 1 (2007) (http://www.hawaii.edu/aplpj/table_of_contents/Spring2007artindex.html)
- 「千年の歴史を持つ議会に学ぶ」、朝日21関西スクエア開放（2007年6月、5項) (Commentary on the Isle of Mann)
- *Watch What You Say: Defamation in Japan* (Defamation Trials, by Yoichiro Hamabe) (Japanese Book Note Series), 20 TEMPLE JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 499 (2006).

- *Child custody in Japan isn't based on rules*, SAN FRANCISCO CHRONICLE, Aug. 27, 2006.
- *Grim bar system may hurt legal reforms*, THE JAPAN TIMES, Sept. 5, 2006.
- *Parents' rights a demographic issue*, THE JAPAN TIMES' July 18, 2006.
- *Not as Alien as We Might Like to Think (Aiko Utsumi's "Nihon-gun no horyo seisaku")*, 11 Journal of Japanese Law 305 (2006) (extended book review).
- *When the POW tables were turned on American forces*, SAN FRANCISCO CHRONICLE, June 11, 2006.
- 「法曹」に新しい定義を, 朝日新聞 (2006年5月11日、朝、30面) (Asahi shinbun (national newspaper) op-ed piece about Japan's new law schools).
- *A Marriage Proposal: Privatize It*, 11 THE INDEPENDENT REVIEW 115 (Summer 2006).
- *Saiban'in Seido: Prospects for Citizen Participation in Criminal Times in Japan*, PACIFIC RIM JOURNAL OF LAW AND POLICY (2006). (extended book review).
- *Marriage Proposal: Why Not Privatize*, SAN FRANCISCO CHRONICLE, Jan. 22, 2006.
- Kaoru Inoue's *SHIHHO NO SHABERISUGI (Blabbermouth*

Judiciary): moral relief, legal reasoning and judicial activism in Japan (book review), 19 EMORY INTERNATIONAL LAW REVIEW 1563 (2005). (Japanese Book Note Series).

- *After Iraq, Let's Bring Democracy to Millions of Americans*, SAN FRANCISCO CHRONICLE, Oct. 2, 2005.
- 「国政参政権ないグアム島民 政治力欠く 米民主主義」, 沖縄タイムス (2005年11月20日、5面) (op-ed piece in Okinawa Times on relocation of US bases from Okinawa to Guam).
- *米国の陪審員制度（市民参加の真意）*、京都新聞 (2005年7月5日、11面) (op-ed piece in Kyoto Shinbun on role of US Jury system).
- *Unusual Citings: Some Thoughts on Legal Scholarship* (Publication pending in JOURNAL OF LEGAL WRITING).
- *Law and Morality in Evolutionary Competition (and why Morality Loses)*, 15 UNIVERSITY OF FLORIDA JOURNAL OF LAW AND PUBLIC POLICY 285, 2004.
- *United States Arms Exports to Taiwan under the Taiwan Relations Act: The Failed Role of Law in United States Foreign Relations*, CONNECTICUT JOURNAL OF INT'L LAW [Vol. 9:51,1993].

- *Narita Airport and the Japanese Constitutions: a Case Study*, LAW IN JAPAN [Vol. 24:39,1991]

Colin P.A. Jones
Attorney at Law
#1304 Pia Marine, 193 Tumon Lane, Tamuning,
Guam, USA 96913
Colin.jones@lexdoxjapan.com

June 1, 2008

Tim Roberts, Esq.

Dooley Roberts & Fowler LLP

Suite 201, Orlean Pacific Plaza

865 South Marine Corps Drive

Tamuning, 96913 Guam, USA

Invoice for May 2008 (Ref. Taniguchi v. Aioi, our file no. D109.81, CV 08-0008

Dear Tim:

The following is my invoice for services rendered during May 2008 in connection with the above-referenced matter.

Nature of Service: Translation of contract cancellation notice into English, review of Japanese medical records, related research and communications via E-mail with you (3 hours total).

Fees (3 hours @ $250/hour)	$750
Gross Receipt Taxes (4%)	$30
Expenses:	none
Total for this invoice:	US$780

Please tender payment in full net of any taxes or fees by: wire transfer in US dollars to:

Account #[XXXXXXXXX], *Account Name: Colin P.A. Jones*

The Citibank Private Bank, Citibank, N.A., 153 53rd St., New York, NY 10043 USA

Fed. Routing Number: 021000089

or, by check addressed to the above address (or such other address as separately notified)

If you have any questions regarding this invoice, please do not hesitate to contact me.

Most cordially,

/s/
Colin P.A. Jones

Colin P.A. Jones
Attorney at Law
#1304 Pia Marine, 193 Tumon Lane, Tamuning,
Guam, USA 96913
Colin.jones@lexdoxjapan.com

September 30, 2008

Tim Roberts, Esq.

Dooley Roberts & Fowler LLP

Suite 201, Orlean Pacific Plaza

865 South Marine Corps Drive

Tamuning, 96913 Guam, USA

Invoice for August-September 2008 (Ref. Taniguchi v. Aioi, our file no. D109.81, CV 08-0008

Dear Tim:

The following is my invoice for services rendered during August-September 2008 in connection with the above-referenced matter.

Nature of Service: Review and comment on discovery documents, communications with prospective Japanese counsel, participation in meetings with prospective Japanese counsel, related research and communications via E-mail with you (7.1 hours total).

Fees (7.1 hours @ $250/hour)	$1,175
Gross Receipt Taxes (4%)	$71
Expenses:	None
Total for this invoice:	US$1846

Please tender payment in full net of any taxes or fees by: wire transfer in US dollars to:

Account #[XXXXXXXXX], *Account Name: Colin P.A. Jones*

The Citibank Private Bank, Citibank, N.A., 153 53rd St., New York, NY 10043 USA

Fed Routing Number: 021000089

or, by check addressed to the above address (or such other address as separately notified)

If you have any questions regarding this invoice, please do not hesitate to contact me.

Most cordially,

/s/
Colin P.A. Jones

Colin P.A. Jones
Attorney at Law
#1304 Pia Marine, 193 Tumon Lane, Tamuning,
Guam, USA 96913
Colin.jones@lexdoxjapan.com

October 31, 2008

Tim Roberts, Esq.
Dooley Roberts & Fowler LLP
Suite 201, Orlean Pacific Plaza
865 South Marine Corps Drive
Tamuning, 96913 Guam, USA

Invoice for October 2008

(Ref. Taniguchi v. Aioi, our file no. D109.81, CV 08-0008

Dear Tim:

The following is my invoice for services rendered during October 2008 in connection with the above-referenced matter.

Nature of Service: Translations of (i) Memorandum from Attorney Yamazaki, (ii) Attorney Yamazaki Resume; (iii) Service request forms; and (vi) portions of agreement, together with meetings with attorney Yamazaki and related consultations (7 hours total).

Fees (7 hours @ $250/hour)	$1,750
Gross Receipt Taxes (4%)	$70
Expenses:	none
Total for this invoice:	US$1820

Please tender payment in full net of any taxes or fees by: wire transfer in US dollars to:

Account #[XXXXXXXXX], *Account Name: Colin P.A. Jones*

The Citibank Private Bank, Citibank, N.A., 153 53rd St., New York, NY 10043 USA

Fed. Routing Number: 021000089

or, by check addressed to the above address (or such other address as separately notified)

If you have any questions regarding this invoice, please do not hesitate to contact me.

Most cordially,

/s/
Colin P.A. Jones

Colin P.A. Jones
Attorney at Law
#1304 Pia Marine, 193 Tumon Lane, Tamuning,
Guam, USA 96913
Colin.jones@lexdoxjapan.com

December 8, 2008

Tim Roberts, Esq.

Dooley Roberts & Fowler LLP

Suite 201, Orlean Pacific Plaza

865 South Marine Corps Drive

Tamuning, 96913 Guam, USA

Invoice for November through invoice date 2008

(Ref. Taniguchi v. Aioi, our file no. D109.81, CV 08-0008

Dear Tim:

The following is my invoice for services rendered during October 2008 in connection with the above-referenced matter.

Nature of Service: E-mail correspondence, review documents, prepare summaries of medical records, certification of translations for litigation (2.5 hours).

Fees (3.0 hours @ $250/hour)	$750
Certification fee	$30
Gross Receipt Taxes (4%)	$31.20
Expenses:	none
Total for this invoice:	US$811.20

Please tender payment in full net of any taxes or fees by: wire transfer in US dollars to:

Account #[XXXXXXXXX], *Account Name: Colin P.A. Jones*

The Citibank Private Bank, Citibank, N.A., 153 53rd St., New York, NY 10043 USA

Fed Routing Number: 021000089

or, by check addressed to the above address (or such other address as separately notified)

If you have any questions regarding this invoice, please do not hesitate to contact me.

Most cordially,

/s/
Colin P.A. Jones

Resume of
KOICHI YAMAZAKI
Member of the Kyoto Bar Asociation
Kamogawa Law Offices
2nd Floor, Choei Bldg.
Marutamachi kudaru, Kiyamachi Tori
Kamigyo-ku, Kyoto Japan

Date of Birth:	November 1, 1958
University:	Graduated from Faculty of Law, Waseda University
Qualifications:	Passed Japanese bar exam in 1981, registered with the Kyoto Bar Association in April of 1984.

Principal Professional Activities

Past	Vice-Chairman, Kyoto Bar Association
	Chairman, Pollution Response and Environmental Protection Committee, Kyoto Bar Association
	Chairman, Legal System Problem reform Committee, Kyoto Bar Association
	2002-2003, Adjunct Professor, Ritsumeikan University Faculty of Law
Present	Committee Member, Saiban'in (mixed jury) System Implementation Committee, Japan Federation of Bar Associations.

Head, Kyoto Bar Association Saiban'in (mixed jury) System Implementation Section

2004-present, Adjunct Professor, Doshisha University Law School (subjects: Civil Code and Legal Practice Clinic)

Practice Areas

General Civil Litigation

Commercial (Corporate)

Administrative Litigation

Criminal Litigation

Exhibit 3

Tort claim case

Plaintiff: Koichi Taniguchi

Defendant: Kan Pacific Saipan

Opinion Memorandum

To: Tim Roberts, Esq.

From: Koichi Yamazaki, Esq.
Kamogawa Law Offices
2d floor Choei Bldg., Kiyamachi-tori,
Marutamachi-sagaru
Chukyo-ku, Kyoto

With respect to the Plaintiff's claims in the above-captioned matter, based on the evidence available to me, I set forth my opinion below.

Basis for Plaintiff's Claim

Plaintiff claims to have been injured on November 6, 2006 when standing on a wooden deck at the defendant hotel which collapsed, causing him to fall and suffer cuts, bruises and ligament damage.

Plaintiff claims that he could have entered into contracts that would have enabled him to use his celebrity as a baseball player for the Yomiuri Giants and the New York Mets to contribute to the business of his employer in Japan and the Northern Marianas Islands by conducting baseball classes and appearing in his employer's advertising. He claims that he has suffered pecuniary damages from being unable to do so.

Discussion and Opinion

1. Extent of Plaintiff's injuries

Evidence and objective facts

(1) According to the physician's diagnosis, 12 weeks of convalescence and 24 weeks of rehabilitation were required.

(2) According to the medical device application certification, plaintiff is required to have the following device applied:
"Flexible left knee orthosis due to medial collateral ligament injury on the inner left side"

(3) There is a certificate showing that crutches were borrowed (however it only shows a commencement date of November 15, 2006 but does not show a return date) though no certification showing they are necessary.

(4) He did not go to the hospital on November 6, 2006, the date of the accident.

(5) Plaintiff traveled to Saipan for leisure November 21-25.

Opinion

(1) If the diagnosis is merely "left inside medial collateral ligament injury" there is no clarity as to the severity (it is a diagnosis which may include extremely minor injuries). The doctor gave a diagnosis that 12 weeks convalescence and 24 weeks rehabilitation were required. This is difficult to believe for the following reasons:

— Plaintiff did not receive treatment on the date of the injury. This was

— Even after returning to Japan, he visited a doctor on the 8th, not the 7th. November 7th was a Tuesday and not a public holiday, so it would have been possible to receive medical attention on that day. This indicates that Plaintiff's injuries were not serious.

— From November 21-25th, Plaintiff returned to Saipan for leisure. Furthermore, according to his passport records, he went to Saipan again from December 12-15 of 2006, December 29 of 2006-January 3 2007, and again in January, February, March, April, June, July and November of 2007. This indicates that Plaintiff did not need convalescence, and was able to conduct life as normal.

— There is no certification indicating the need for crutches. There is a certification showing the need for a knee supporter, but being capable of treatment with a supporter is indicative of the limited extent of the ligament injury.

(2) Japanese medical institutions maintain records (the "karute") showing the objective results (X-rays, CT Scans, MRI scans, etc.) of each examination they conduct. Medical institutions are

required by law to maintain these records, and if requested must give all such records to the patient. Accordingly, Plaintiff should have been able to provide all of these records to Defendant. It is not legally possible that he cannot produce them. Submission of these medical records would make clear the extent of Plaintiff's injuries.

2. Plaintiff's Celebrity

Plaintiff's history as set forth in his home page and directories of baseball players, is as follows:

1992 joins Yomiuri Giants

1998 transfers to Seibu Lions

1999 transfers to Kintetsu Buffalos

2000 transfers to Texas Rangers (AAA team)

2003 retires

Comment [CPAJ1]: olin, according to his web page he also played for the Newark Bears, the Atlantic City Surf, and the Jackson Senators during the 2000-2003 period.

At the Yomiuri Giants, Plaintiff only took the mound in three games in 1993, and had an earned run average (ERA) of 9.00. In 1999 at the Kintetsu Buffalos was on the mound for four games and had an ERA of 5.40. During his career in Japan he was only on the mound 7 times and each time was mid-game. Furthermore, he only participated in the New York Mets camp an wad never on the team.

Accordingly, as a baseball player, Plaintiff was not active, and the degree of his name recognition and celebrity is extremely low. Thus, while there might be demand for him to teach baseball classes, he would have no value as a celebrity endorsement in advertising.

3. Contracts with Kyowa Group

Plaintiff asserts he has the following three contracts:

Contract 1: Kyowa lead Company K.K. (March 20, 2006)

Contract 2: Eight Grape Corporation Y.K. (May 8, 2006)

Contract 3: Kyowa Tatemono (July 4, 2006)

(1) Contract 1 has annual compensation of ¥30,000,000, Contract 2 ¥40,000,000 and Contract 3, ¥50,000,000. Each contract purports to be an exclusive affiliation agreement (Article 8 of each). Furthermore, since each contract is largely identical in form, all can be considered contracts with the Kyowa Group. That being the case, however, it is odd that they were deliberately executed on different dates. In addition, collectively they provide for extremely high compensation of ¥120,000,000 (¥10,000,000 per month). It is impossible that a retired "former baseball player", who was inactive and has little fame would be paid such compensation.

(2) Furthermore, it is extremely odd that Contract 1 dates back 7 months prior to the accident yet no compensation has been paid under it.

(3) Furthermore, Plaintiff has not performed a single activity under these contracts.

(4) On his home page, Plaintiff indicates a price of ¥105,000 for one three hour baseball class (for 40 students). However, the work request documents provided by Kyowa Lead Company K.K. for Plaintiff's scheduled activities indicate a price of ¥500,000 for two hours. This is an impossible amount, and is highly unnatural.

Based on the above, I believe that the three contracts are false and intended as a basis for claiming damages.

4. Pay Stubs.

Plaintiff has provided pay stubs for April 2006 and September 2007. These are for income separate from the exclusive affiliation agreements.

Plaintiff is engaged in the business of Kyowa Lead Company's "Big Sea 45, 48" and they may be for this salary. They show him working a large number of days for the periods in question (20 and 25), but given the frequency of his trips to Saipan the number of working days are suspicious.

5. Contract Termination Notices

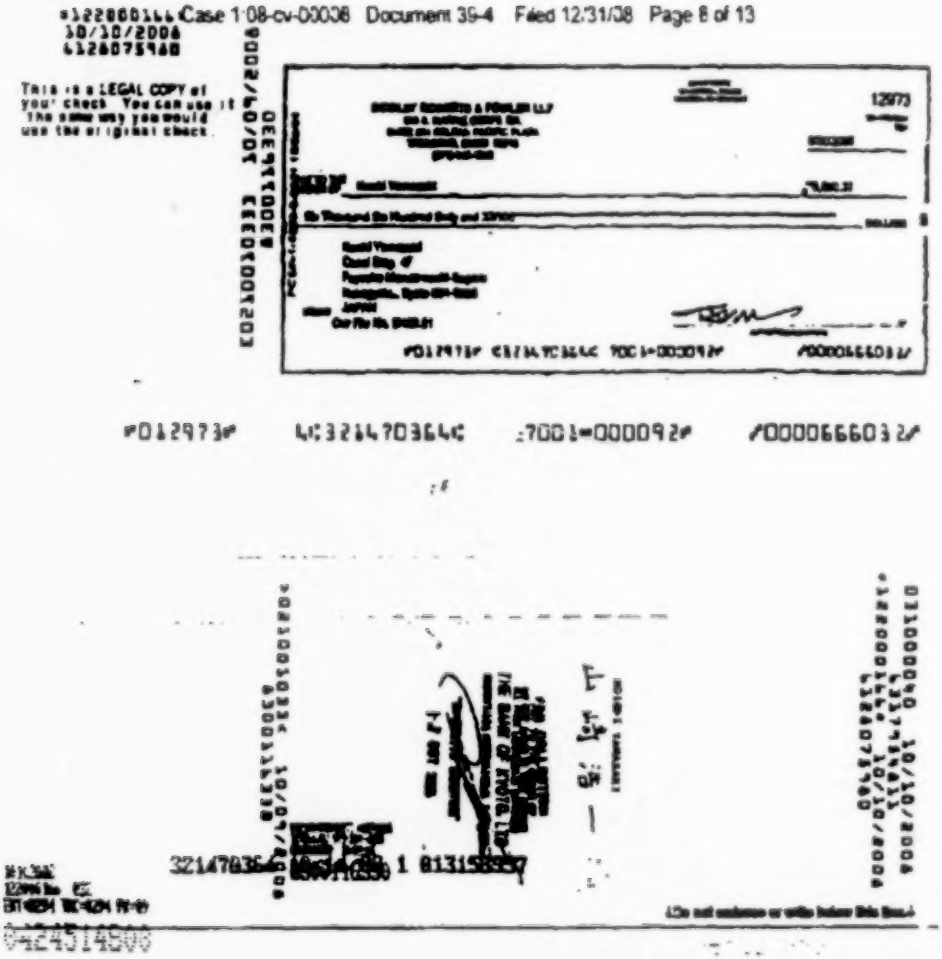
Plaintiff asserts that the only termination notice in existence is the one from Kyowa Lead Company. The reason for the absence of the other two is because the other two companies ceased to exist. However, Kyowa Tatemono K.K. is the central entity in the Kyowa group. This is readily apparent from the company's home page. Furthermore, based on the type of injury suffered by the Plaintiff, it is hard to believe that he could not perform his duties. Since there was not a single activity of Plaintiff that did exist under the three contracts, there are no circumstances whereby Plaintiff cannot perform these activities. Accordingly, there is no basis for terminating the contracts. Thus, the termination notices have no credibility and were documents created for the purpose of this tort action.

6. Investigation of three parties making activity requests.

Status pending. Will notify when information becomes available.

7. Owner of Plaintiff's residence

The apartment in which Plaintiff resides is the personal property of the former President Endo of the Kyowa Group. Plaintiff appears to have a close relationship with Endo.


This is a LEGAL COPY of your check. You can use it the same way you would use the original check.
12973

DOCKET ROBERTS & FOWLER LLP
SUITE 400 ORLEANS PACIFIC PLAZA

12660

ORDER OF THOMAS ROBERTS

Eight Hundred Twenty-Eight and 00/100

THOMAS ROBERTS

POSTAGE COSTS ADVANCED

Rmbrs D136.81

THOMAS ROBERTS
Cost Advanced

Our File No. D136.81
Rmbrs for airfare

12660

Bank Pacific CA Nbw Rmbrs D136.81

Cost Advanced

Our File No. D136.81
Rmbrs for airfare

Bank Pacific CA Nbw Rmbrs D136.81

Case [illegible] Document 364 Filed [illegible] Page 10 of 13

12985

[illegible]

10/[illegible]/2008

PAY TO THE ORDER OF THOMAS ROBERTS $ [illegible]

One Thousand [illegible] and 83/100 DOLLARS

THOMAS ROBERTS

MEMO Re: Our File No. D105.81

[illegible]

[illegible]

[illegible]

THOMAS ROBERTS 10/1/2008 12985

Cost Advances	Lunch in Kyoto		66.23
Cost Advances	Dinner in Kyoto		180.32
Cost Advances	Hotel Charges while in Kyoto		568.85
Cost Advances	Airfare to Saipan		236.38
	Our File No. D105.81		

Bank Pacific CA Now Re: Our File No. D105.81 1,080.83

[illegible]

THOMAS ROBERTS 10/1/2008 12985

Cost Advances	Lunch in Kyoto		66.23
Cost Advances	Dinner in Kyoto		180.32
Cost Advances	Hotel Charges while in Kyoto		568.85
Cost Advances	Airfare to Saipan		236.38
	Our File No. D105.81		

Bank Pacific CA Now Re: Our File No. D105.81 1,080.83

[illegible]

DEPO RESOURCES
#49 Anacoco Lane
Nimitz Hill Estates
Piti, GU. 96915

INVOICE

DATE	INVOICE NO.
10/28/'08	08230

BILL TO
LAW OFFICE OF DOOLEY, ROBERTS FOWLER Thomas L. Roberts, Attorney Suite 201, Orlean Pacific Plaza 865 S. Marine Corps Drive Tamuning, GU. 96913

ORIGINAL

ORDERED BY	DUE DATE	CASE NUMBER
T. Roberts	Due on receipt	CV 08-0008

DESCRIPTION	QTY	RATE	AMOUNT
DEPOSITION OF KOICHI TANIGUCHI 10/20/08			
Transcript Pages – Original Certified	114	4.00	456.00
Transcript Pages – Copy	114	1.75	199.50
Transcript Pages – Translated (per page)	114	1.75	199.50
Expedited Premium: 3-6 days production	114	4.75	541.50

Outside Recording	114	1.75	199.50
Audio Sound File Conversion - Tape to Digital	3	35.00	105.00
Transcript Binding	2	10.00	20.00
Sealed Document	1	5.00	5.00
KOICHI TANIGUCHI vs. KAN PACIFIC SAIPAN, LTD. DBA MARIANA RESORT AND SPA			
It's been a pleasure working with you! Please remit payment to the above address			**Total** $1,726.00

Exhibit 5

DEPO RESOURCES
#49 Anacoco Lane
Nimitz Hill Estates
Piti, GU. 96915

INVOICE

DATE	INVOICE NO.
10/30/'08	08233

BILL TO
LAW OFFICE OF DOOLEY, ROBERTS FOWLER Thomas L. Roberts, Attorney Suite 201, Orlean Pacific Plaza 865 S. Marine Corps Drive Tamuning, GU. 96913

ORIGINAL

ORDERED BY	DUE DATE	CASE NUMBER
T. Roberts	Due on receipt	CV 08-0008

DESCRIPTION	QTY	RATE	AMOUNT
DEPOSITION OF KOICHI TANIGUCHI 10/20/08			
Transcript Pages – Original (w/corrections)	114	1.75	199.50
Transcript Pages – Copy	114	1.75	199.50
Transcript Binding	2	10.00	20.00
Audio Sound File – CD	2	35.00	70.00

KOICHI TANIGUCHI vs. KAN PACIFIC SAIPAN, LTD. DBA MARIANA RESORT AND SPA			
It's been a pleasure working with you! Please remit payment to the above address			**Total** $489.00

To: Mr. Tim Roberts
Dooley Roberts & Fowler LLP
Suite 201 Orlean Pacific Plaza
865 S. Marine Corps Dr.
Tamuning, Guam 96913

From: Kayoko Irinaka
P.O. BOX 502524 CK
SAIPAN MP 96950-2524
670-288-8692
670-285-8692

RE: Translation Service

Dear Sir,

I, Kayoko Irinaka had provided Japanese-English translation service to Mr. Tom Roberts during his meeting at Mr. Richard Pierce law office in Saipan on October 20, 2008.

Meeting had started w. Mr. Taniguchi the plaintiff, together with his lawyer and witness from 9am-1pm, after lunch break restarted from 2pm-4:20pm.

My service charges are $40 per hour and total number of hours I worked for the meeting was 6.5 hours.

Therefore the total amount of my service charges is $260 ($40 x 6.5h) for the day.

Should you have any question or correction, please contact me anytime.

Thank you.

Best regards,

Kayoko Irinaka

Exhibit 6

Tim Roberts, Esq.
Dooley Roberts & Fowler LLP
Suite 201, Orlean Pacific Plaza
865 South Marine Corps Drive
Tamuning, Guam 96913
Telephone No. (671) 646-1222
Facsimile No. (671) 646-1223
Email: roberts@guamlawoffice.com

Attorneys for Defendant
Kan Pacific Saipan, Ltd.
dba Mariana Resort and Spa

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

KOICHI TANIGUCHI, Plaintiff, vs. KAN PACIFIC SAIPAN, LTD. dba Mariana Resort and Spa, Defendant.	)	CIVIL CASE NO. 08-00008 **AMENDED AFFIDAVIT OF TIM ROBERTS, ESQ.**

I, Tim Roberts, being first duly sworn, do hereby depose and state upon my oath as follows:

1. This Amended Affidavit is necessitated by several typographical and other clerical errors in the Affidavit filed earlier today in support of an award of costs. Additionally, I need to make it clear to the Court and the Clerk of Courts that the costs described herein were billed to and paid by Kan Pacific's liability insurer, Aioi Insurance Company,

Ltd. ("Aioi"), represented in the CNMI by its licensed general agent, Takagi & Associates, Inc. As Kan Pacific's liability insurer, Aioi had a contractual duty to defend Kan Pacific against Mr. Taniguchi's claims in this lawsuit.

2. Along with Richard Pierce, Esq., I am the attorney of record for Defendant Kan Pacific Saipan Ltd. dba Mariana Resort and Spa ("Kan Pacific") in the above captioned case. This is the affidavit required by 28 USC §1924. All costs described in this Affidavit and the Bill of Costs also filed and served today were necessarily incurred in the defense of Kan Pacific in this case. All such costs, which are described in paragraph 3(a) through 3(e) of this Affidavit, were billed to and paid by Aioi.

3. Exhibit 1 to this affidavit is a true and correct copy is a bill of costs prepared by my office's bookkeeper, at my direction and under my supervision. On my instructions, all photocopying fees were deleted, since in my experience it is too much trouble to justify what photocopying fees were actually necessary and what were not. The remainder of the bill reflects the following costs which were incurred in the defense of Kan Pacific:

(a). Fees paid to a Japanese translator I retained specifically for this case, Colin P.A. Jones. A true and correct copy of Mr. Jones' resume and his invoices for translation services are collectively attached to this affidavit as Exhibit 2. Mr. Jones' services were invaluable to Mr. Piece and I during this case. It was, in fact, Mr. Jones who introduced me to our expert witness, Koichi Yamazaki, a Japanese lawyer practicing in Kyoto, Japan, where Mr. Jones teaches American law to Japanese

students. Mr. Jones also translated for me at a meeting I had with Mr. Yamazaki in Kyoto. He did not charge for travel time.

(b) Expert witness fees for consultation, investigation, advice, and a report, paid to Koichi Yamazaki, Esq., an attorney practicing in Kyoto, Japan. Mr. Yamazaki charged us JPY 700,000 for these services, which was $6,660.32 in U.S. dollars at the time. Copies of Mr. Yamazaki's resume, his report, and our firm's check to him for $6,660.32 are collectively attached hereto as Exhibit 3.

(c) Air fare and hotel charges incurred on a trip to Kyoto, Japan to meet personally with Mr. Yamazaki. Mr. Yamazaki's English, while passable in person, made it difficult for me to communicate with him over the telephone or by e-mail. In my 24 years experience practicing law on Guam and throughout Micronesia, it has been my experience that it is much easier to communicate in person with native Japanese speakers with limited English abilities, through repetition, gestures, and handwritten notes. For this reason – and because our translator Colin Jones also lives in Kyoto and translated for me at the meeting – it was necessary for me to fly to Kyoto, Japan to meet with Mr. Yamazaki. The decision on whether I would fly to Kyoto to meet with Yamazaki, or whether Mr. Yamazaki would fly to Guam for the meeting, was dictated by simple economics. I was charging $180 per hour in this case. I was informed by Colin Jones that Mr. Yamazaki's fees ordinarily exceed $400 per hour. It was therefore much less expensive for me to fly to Kyoto rather than for Mr. Yamazaki to fly to Guam. My air fare to Japan and back was $898.60, and the hotel bill was $568.92,

without any reimbursement being sought for ground transportation or meals. Copies of office checks to reimbursing me for these costs are attached hereto as Exhibit 4. As mentioned above, these costs were billed to and paid by Aioi.

(d) Deposition costs incurred in connection with the deposition of Plaintiff Koichi Taniguchi on October 20, 2008. These consisted of a bill for $1,726.00 from Depo Resources, Inc. and a bill for $489.00 from Depo Resources, Inc., for a transcript of the deposition of Mr. Taniguchi. A copy of the two bills received by Depo Resources for its work are collectively attached hereto as Exhibit 5.

(e) Translation services provided by Saipan resident Kayoko Irinaka in the total amount of $260.00. Ms. Irinaka was the Japanese-English translator at Mr. Taniguchi's deposition. A copy of the bill we received by Ms. Irinaka is attached hereto as Exhibit 6.

4. I declare under oath and under penalty of perjury that the foregoing is true and correct.

Executed this 31st of December, 2008 in Tamuning, Guam.

/s/
TIM ROBERTS, ESQ.

Tamuning, Guam) ss:

Before me, the undersigned Notary Public, Tim Roberts, Esq. duly appeared and was duly sworn. Being so sworn, Mr. Roberts stated that he is the attorney of record for Kan Pacific Saipan, Ltd. dba Mariana Resort & Spa in this action and has

knowledge of the facts relative to the costs and disbursements described in this Affidavit and the accompanying Bill of Costs, that the items described herein above and in the Bill of Costs are correct, have been necessarily incurred in this action, and that the services charged for have been actually performed and were necessarily performed.

SUBSCRIBED AND SWORN TO BEFORE ME on December 31, 2008 in Tamuning, Guam, to certify which I place my signature and official seal.

[*Notary seal*] /s/ Jessica Kim
Notary Public

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
NOV 2 8 2011
OFFICE OF THE CLERK

No. 10-1472

IN THE
Supreme Court of the United States

KOUICHI TANIGUCHI,

Petitioner,

v.

KAN PACIFIC SAIPAN, LTD.,
doing business as Marianas Resort and Spa,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONER

DOUGLAS F. CUSHNIE
P.O. Box 500949
Saipan, MP 96950
(670) 234-6843

DONALD B. AYER
Counsel of Record
MICHAEL S. FRIED
CHRISTOPHER J. SMITH
JANE E. HOLMAN
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
dbayer@jonesday.com
(202) 879-3939

November 28, 2011

Counsel for Petitioner

Library of Congress
Law Library

QUESTION PRESENTED

Section 1920 of 28 U.S.C. sets out the categories of costs that may be awarded to the prevailing party in a federal lawsuit. One of the listed categories is "compensation of interpreters." *Id.* § 1920(6).

The question presented is whether costs incurred in translating written documents are "compensation of interpreters" for purposes of subsection 1920(6).

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Kouichi Taniguchi and Kan Pacific Saipan, Ltd. ("Kan Pacific"), doing business as Marianas Resort and Spa.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT 2

A. Statutory Background 2

B. Proceedings Below 7

ARGUMENT 12

I. THE STATUTE'S PLAIN MEANING FORECLOSES THE TAXATION OF DOCUMENT TRANSLATION COSTS 12

A. The Word "Interpreters" Does Not Apply to Translators of Written Texts 12

B. The Structure of the Court Interpreters Act, and the United States Code as a Whole, Make Clear That Document Translators Are Not "Interpreters" For Purposes of the Statute 25

II. ANY AMBIGUITY SHOULD BE RESOLVED IN FAVOR OF MR. TANIGUCHI'S POSITION 33

A. The Legislative History Confirms the Limitation to Spoken Interpretation 33

TABLE OF CONTENTS
(continued)

Page

B. Cost-Shifting Statutes Are in Derogation of the Common Law and Must Be Narrowly Construed 36

III. THE CONGRESSIONAL DECISION TO ALLOW TAXATION OF COSTS OF INTERPRETERS BUT NOT TRANSLATORS IS SENSIBLE AS A MATTER OF POLICY 37

IV. THE ARGUMENTS ADDUCED BY THE NINTH CIRCUIT IN SUPPORT OF ITS CONTRARY RULING ARE INCORRECT 42

CONCLUSION 43

TABLE OF AUTHORITIES

Page(s)

CASES

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
421 U.S. 240 (1975) ..... *passim*

Antoni v. Greenhow,
107 U.S. 769 (1883) 36

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,
548 U.S. 291 (2006) 43

BDT Prods., Inc. v. Lexmark Int'l, Inc.,
405 F.3d 415 (6th Cir. 2005) 8

City of Milwaukee v. Illinois,
451 U.S. 304 (1981) 36

Comm'r of Internal Revenue v. Lundy,
516 U.S. 235 (1996) 29

Corning Glass Works v. Brennan,
417 U.S. 188 (1974) 17

Crawford Fitting Co. v. J.T. Gibbons, Inc.,
482 U.S. 437 (1987) ..... *passim*

Day v. Woodworth,
54 U.S. (13 How.) 363 (1851) 36

Director OWCP v. Newport News Shipbuilding & Dry Dock Co.,
514 U.S. 122 (1995) 32

Dolan v. United States Postal Serv.,
546 U.S. 481 (2006) 16

Extra Equipamentos E Exportação Ltda. v. Case Corp.,
541 F.3d 719 (7th Cir. 2008) 8, 9, 16, 38

F. Hoffmann-La Roche Ltd. v. Empagran S.A.,
542 U.S. 155 (2004) 41

TABLE OF AUTHORITIES
(continued)

Page(s)

Fairfax's Devisee v. Hunter's Lessee,
11 U.S. (7 Cranch) 603 (1812) 11, 36

Farmer v. Arabian Am. Oil Co.,
379 U.S. 227 (1964) 37

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 25

Fleischmann Distilling Corp. v. Maier Brewing Co.,
386 U.S. 714 (1967) 38, 39

Hathaway v. Roach,
11 F. Cas. 818 (D. Mass. 1846) 2

Kansas v. Colorado,
129 S. Ct. 1294 (2009) 37

Leocal v. Ashcroft,
543 U.S. 1 (2004) 16

Louisiana Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986) 16

Lowe v. Kansas,
163 U.S. 81 (1896) 36

Mallard v. United States Dist. Ct.,
490 U.S. 296 (1989) 15

Mobil Oil Corp. v. Higginbotham,
436 U.S. 618 (1978) 36

Muscarello v. United States,
524 U.S. 125 (1998) 15

Ortho-McNeil Pharm., Inc. v. Mylan Labs. Inc.,
569 F.3d 1353 (Fed. Cir. 2009) 39

Roadway Express, Inc. v. Piper,
447 U.S. 752 (1980) 3, 27

TABLE OF AUTHORITIES
(continued)

Page(s)

Société Nationale Industrielle Aerospatiale v. United States Dist. Ct., 482 U.S. 522 (1987) 40, 41

Sorenson v. Sec'y of Treasury, 475 U.S. 851 (1986) 27, 28

Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters & Joiners of Am., 456 U.S. 717 (1982) 38

United States v. Texas, 507 U.S. 529 (1993) 36

Utah v. Evans, 536 U.S. 452 (2002) 17

Watson v. United States, 552 U.S. 74 (2007) 16

W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991) 32, 33

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

1 Rev. Stat. 184 (1875) 4

1 Stat. 73 § 34 (1789) 2

1 Stat. 275 § 6 (1791) 2

10 Stat. 168 § 3 (1853) 4

62 Stat. 955 (1948) 5

8 U.S.C. § 1555 30

10 U.S.C. § 1588 31

10 U.S.C. § 1596b 31

15 U.S.C. § 649 30

22 U.S.C. § 2695a 31

26 U.S.C. § 44 32

TABLE OF AUTHORITIES
(continued)

Page(s)

28 U.S.C. § 530C 31

28 U.S.C. § 1254 1

28 U.S.C. § 1827 ..... *passim*

28 U.S.C. § 1828 ..... *passim*

28 U.S.C. § 1920 ..... *passim*

28 U.S.C. § 1920 note (1948) 5

42 U.S.C. § 254b 31

42 U.S.C. § 300mm-4 31

42 U.S.C. § 1396b 31

42 U.S.C. § 1397ee 31

42 U.S.C. § 1988 33

42 U.S.C. § 2991b-3 31

42 U.S.C. § 12103 32

Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040 (1978) ..... *passim*

Fed. R. Civ. P. 54 ..... 8, 9, 12, 42

Fed. R. Civ. P. 43 ..... 29, 30

Fed. R. Evid. 604 ..... 29, 30

Judicial Code of 1911, 36 Stat. 1169 § 297 (1911) 4

Pub. L. No. 100-702 (1988) 6

Pub. L. No. 104-317 § 306, 110 Stat. 3852 (1996) 6

OTHER AUTHORITIES

119 Cong. Rec. 14,449 (May 7, 1973) 33

TABLE OF AUTHORITIES
(continued)

Page(s)

12,000 WORDS: A SUPPLEMENT TO WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) 15

1 Benjamin Vaughan Abbott, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE (1879) 16

A Day in the Life of a Translator/Interpreter, *available at* http://www.atanet.org/careers/career_video.php 22

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992) 14

American Translators Association, http://www.atanet.org/onlinedirectories/ 22

American Translators Association, "Interpreting, Getting it Right: A Guide to Buying Interpreting Services," *available at* http://www.atanet.org/docs/Getting_it_right_int.pdf 22

American Translators Association, "Translation, Getting it Right: A Guide to Buying Translation," *available at* http://www.atanet.org/docs/Getting_it_right.pdf 23

William C. Anderson, DICTIONARY OF LAW (1889) 16

James A. Ballentine, A LAW DICTIONARY OF WORDS, TERMS, ABBREVIATIONS AND PHRASES WHICH ARE PECULIAR TO LAW AND OF THOSE WHICH HAVE A PECULIAR MEANING IN THE LAW (1916) 16

TABLE OF AUTHORITIES
(continued)

Page(s)

Bench & Bar Committee of Nat'l Ass'n of Judiciary Interpreters & Translators, "Interpreting in a Legal Setting: A Guide for the Attorney," (2011), *available at* http://www.najit.org/documents/bandb/BBpowerpoint.pdf 21

Michael L. Bender, Chief Justice, Supreme Court of Colorado, "Directive Concerning Language Interpreters and Access to the Courts by Persons with Limited English Proficiency," *available at* http://www.justice.gov/crt/about/cor/agreements/CJD_06-03_Signed.pdf 25

The Bilingual Courts Act: Hearings Before the Subcomm. on Improvements on Judicial Machinery of the S. Comm. on the Judiciary, 93d Cong. 17 (1973) 33

Henry Campbell Black, BLACK'S LAW DICTIONARY (4th ed. 1968) 15

Hadumod Bussmann, ROUTLEDGE DICTIONARY OF LANGUAGE AND LINGUISTICS (1996) 13

CHAMBERS DICTIONARY (2006) 14

Peter Hodgson Collin, DICTIONARY OF LAW (1999) 15

CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (1917) 14

Cong. Globe, 32d Cong., 2d Sess. app. 207 (1853) 3

TABLE OF AUTHORITIES
(continued)

Page(s)

Court Interpreters Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 95th Cong. 150 (1978) 34, 35

Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002) 24

Federal Interagency Working Group on Limited English Proficiency, http://www.lep.gov/iwglep.htm 24

Federal Interagency Working Group on Limited English Proficiency, *On Choosing a Language Access Provider, available at* http://www.justice.gov/crt/lep/resources/leptatool.pdf 24

French Penal Code Law No. 80-538 40

Jack P. Friedman, DICTIONARY OF BUSINESS TERMS (4th ed. 2007) 13

FUNK & WAGNALLS COMPREHENSIVE STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (1921) 14

Roseann Dueñas González, Victoria F. Vásquez, & Holly Mikkelson, FUNDAMENTALS OF COURT INTERPRETATION (1991) 12, 13, 18

5 GUIDE TO JUDICIARY POLICY: COURT INTERPRETING 23, 27

H.R. 10228 § 3, 95th Cong. (1st Sess. 1977) 35

TABLE OF AUTHORITIES
(continued)

Page(s)

H.R. Rep. No. 95-1687 (1978) 6, 33, 35

Interpreters and Translators, Occupational Outlook Handbook, *available at* http://www.bls.gov/oco/ocos175.htm 25

Nina L. Ivanichvili, *Considerations in Selecting Interpreters and Translators*, 39 COLO. LAW. 39 (2010) 19

Frank Johnson, "Being Bilingual is Not Enough," Featured Article from the ATA Chronicle (July 2008), *available at* http://www.atanet.org/chronicle/feature_article_july2008.php 22

Elena M. de Jongh, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE (1992) 13, 17, 18, 19

Judiciary Interpreters & Translators, "Interpreting in a Legal Setting: A Guide for the Attorney," (2011), *available at* http://www.najit.org/documents/bandb/BBpoBBpowerp.pdf 21

Marianne Mason, COURTROOM INTERPRETING (2008) 19

MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004) 15

MERRIAM-WEBSTER'S DICTIONARY OF LAW (1996) 15

Holly Mikkelson, INTRODUCTION TO COURT INTERPRETING (2000) 17, 20

TABLE OF AUTHORITIES
(continued)

Page(s)

William Morris, ed., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1978) 14

NAJIT Position Paper, "Information for Court Administrators," (2003), *available at* http://www.najit.org/publications/Court%20AdministratorFINAL.pdf 21

Eva N.S. Ng, "The Tension Between Adequacy and Acceptability in Legal Interpreting and Translation," *in* Sandra Hale, Uldis Ozolins, & Ludmila Stern, eds., THE CRITICAL LINK 5: QUALITY IN INTERPRETING—A SHARED RESPONSIBILITY 37 (2009) 19

OXFORD AMERICAN DICTIONARY (1980) 13

OXFORD ENGLISH DICTIONARY (1989) 14

Philip M. Payne, *Costs in Common Law Actions in the Federal Courts*, 21 VA. L. REV. 397 (1934) 3, 36

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 40

S. Rep. No. 95-569 (1977) 33

Geoffrey Samuelsson-Brown, A PRACTICAL GUIDE FOR TRANSLATORS (4th ed. 2004) 17, 18

Morry Sofer, THE TRANSLATOR'S HANDBOOK (7th ed. 2009) 17, 18

WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) 13

WEBSTER'S II: NEW REVISED UNIVERSITY DICTIONARY (1984) 13

TABLE OF AUTHORITIES
(continued)

Page(s)

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) 14

Edwin B. Williams, ed., THE SCRIBNER-BANTAM ENGLISH DICTIONARY (1977) 14

27 Charles Alan Wright & Victor James Gold, FEDERAL PRACTICE AND PROCEDURE § 6053 (2007) 29, 30

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's award of costs is reported at 633 F.3d 1218. Pet. App. 1a-8a. In a separate, unpublished memorandum disposition, the court of appeals affirmed the district court's entry of summary judgment in favor of Kan Pacific. Pet. App. 9a-11a. The district court's decisions granting summary judgment for the defendant, Pet. App. 12a-18a, granting in part the defendant's bill of costs, Pet. App. 19a-22a, and denying plaintiff's motion objecting to costs, Pet. App. 23a-26a, are unreported.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion on March 8, 2011 and denied Mr. Taniguchi's petition for rehearing on May 11, 2011. The petition for a writ of certiorari was filed on June 3, 2011. On September 27, 2011, this Court granted the petition. This Court has jurisdiction under subsection 1254(1) of 28 U.S.C.

STATUTORY PROVISION INVOLVED

Section 1920 of 28 U.S.C. provides:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and the costs of making copies of any materials where the

copies are necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

STATEMENT

A. Statutory Background

Although taxable litigation costs were not allowed at common law, *see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975), the first Judiciary Act authorized certain costs awards in many federal lawsuits in the same manner as the courts of the respective forum States. That statute provided that "the laws of the several states" ordinarily "shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." 1 Stat. 73 § 34 (1789). Section 34 was understood to "appl[y] to the rights to costs as well as to the rights connected with the merits," *Hathaway v. Roach*, 11 F. Cas. 818, 819 (D. Mass. 1846).

The regime based on State law regarding costs remained in effect for several decades, both under this general provision and under a succession of several more specific, temporally limited statutes directed toward the taxation of costs. *See, e.g.*, 1 Stat. 275 § 6 (1791) (providing that certain costs "shall be recovered in like manner as the fees of the officers of the states respectively"). Federal courts

continued to use State costs rules until the mid-nineteenth century. *See, e.g.*, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987) ("Apparently from 1799 until 1853 federal courts continued to refer to state rules governing taxable costs."); *see also* Philip M. Payne, *Costs in Common Law Actions in the Federal Courts*, 21 VA. L. REV. 397, 402-03 (1934) (collecting cases).

Over the course of these early decades, as the number of States increased and the federal courts developed experience with the diverse costs rules used by different States, certain problems became apparent. Recoverable costs, particularly attorneys' fees, had "'swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they [we]re taxed.'" *Alyeska Pipeline*, 421 U.S. at 251 n.24 (quoting Cong. Globe, 32d Cong., 2d Sess. app. 207 (1853) (remarks of Sen. Bradbury)). Moreover, the increasing diversity in the States' treatment of costs had led to unfair disparities between similarly situated litigants. *See id.* at 251 & n.24 (noting the "great diversity in practice" as an asserted concern with the State-based costs system).

In light of these concerns, in 1853, the Congress abandoned that system of taxing costs, and adopted a unitary federal costs regime. In doing so, it elected to "enumerate[] the costs that ordinarily may be taxed to a losing party" in federal cases, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757 (1980), and to exclude from cost recoveries expenses incurred of types not affirmatively provided by statute, *see Crawford Fitting*, 482 U.S. at 440. Specifically, the 1853 statute provided that "[t]he bill of fees of the clerk,

marshal, and attorneys, and the amount paid printers, and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trial in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court . . . ." 10 Stat. 168 § 3 (1853).

The Congress left this cost provision of the 1853 law substantially unchanged in the Revised Statutes of 1874[1] and the Judicial Code of 1911[2]. *See Alyeska Pipeline*, 421 U.S. at 255. The text was altered in the Revised Code of 1948, which first codified 28 U.S.C. § 1920, specifying taxable costs in five subsections.[3]

---

[1] "Sec. 983. The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause." 1 Rev. Stat. 184 (1875).

[2] The Judicial Code of 1911 did not affirmatively repeal the costs provision of the Revised Statutes, which consequently "remain[ed] in force with the same effect and to the same extent as if [the 1911] Act had not been passed." 36 Stat. 1169 § 297 (1911).

[3] § 1920. Taxation of costs.

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

While the 1948 statute made several "[c]hanges . . . in phraseology," 28 U.S.C. § 1920 note (1948), it did not reflect "any apparent intent to change the controlling rules." *Crawford Fitting*, 482 U.S. at 440.

The Congress first amended section 1920 in 1978, when it acted to expand the use of foreign language interpreters in federal court proceedings. The Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040 (1978), "establish[ed] a program to facilitate the use of interpreters" in certain judicial proceedings instituted by the United States. *Id.* § 2 (codifying 28 U.S.C. § 1827). The statute also "establish[ed] a program for the provision of special interpretation services" in the federal courts to "provide a capacity for simultaneous interpretation services in multidefendant criminal actions and multidefendant civil actions." *Id.* (codifying 28 U.S.C. § 1828).

The interpretation services addressed in the Court Interpreters Act were oral in nature. The statute required the appointment of an interpreter in certain judicial proceedings where a party or witness "speaks only or primarily a language other than the English language," or "suffers from a hearing impairment," and might therefore be inhibited from understanding "the proceedings or communicati[ng] with counsel or the presiding judicial officer," or from

---

(continued...)

> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

62 Stat. 955 (1948).

"comprehen[ding] . . . questions and the presentation of . . . testimony." *Id.* (codifying 28 U.S.C. § 1827(d)). Accordingly, the Court Interpreters Act affirmatively specified the methods of interpretation at issue, all of which were methods of interpreting live, spoken proceedings.[4]

Complementing these primary provisions, the Court Interpreters Act amended section 1920 to add a new subparagraph (6). This new subsection

---

[4] The Court Interpreters Act directed that "[t]he interpretation provided by certified interpreters pursuant to [section 1827] shall be in the consecutive mode except that the presiding judicial officer, with the approval of all interested parties, may authorize a simultaneous or summary interpretation . . . ." Pub. L. No. 95-539 § 2 (codifying 28 U.S.C. § 1827(k)). It provided that the special interpretation services under section 1828 be performed in the "simultaneous" mode. *Id.* (codifying 28 U.S.C. § 1828(a)).

The simultaneous mode involves the act of "interpret[ing] and . . . speak[ing] contemporaneously with the individual whose communication is being translated." H.R. Rep. No. 95-1687, at 8 (1978). The consecutive mode involves "the speaker, whose communication is being translated, . . . paus[ing] to allow the interpreter to convey the testimony given." *Id.* And the summary mode "allow[s] the interpreter to condense and distill the speech of the speaker." *Id.*

In 1988, the Congress amended section 1827, modifying the specified modes of interpretation. *See* Pub. L. No. 100-702. The provision now reads: "The interpretation provided by certified or otherwise qualified interpreters pursuant to [section 1827] shall be in the simultaneous mode for any party to a judicial proceeding instituted by the United States and in the consecutive mode for witnesses," unless the district court specifies the other mode. 28 U.S.C. § 1827(k). Additionally, in 1996, the Congress amended section 1827 to add a new subsection (l), specifically providing for the appointment of "sign language interpreter[s]" for the hearing impaired. Pub. L. No. 104-317 § 306, 110 Stat. 3852, 3854.

allowed federal courts to tax as costs the "[c]ompensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." Pub. L. No. 95-539 § 7, 92 Stat. 2040, 2044.

B. Proceedings Below

Kouichi Taniguchi, a Japanese national, was visiting the Marianas Resort and Spa in the Northern Mariana Islands when he fell through a wooden deck on its premises. Pet. App. 2a. Mr. Taniguchi brought this negligence action against the owner of the resort, Kan Pacific Saipan, Ltd. *Id.* During the course of the litigation, Kan Pacific retained a document translator, Colin P.A. Jones, to translate written documents, including "portions of [an] agreement," a "[m]emorandum," and "summaries of medical records," from Japanese to English. JA 83, 85.

Both Mr. Taniguchi and Kan Pacific moved for summary judgment. Pet. App. 2a. The district court granted summary judgment for Kan Pacific, finding insufficient evidence that the resort had been negligent in maintaining the deck. *Id.* at 16a-17a. Kan Pacific then submitted a bill of costs, which requested the taxation $5,517.20 for "compensation of interpreters." JA 39-40. This amount included $260 that Kan Pacific had expended compensating Kayoko Irinaka, who served as an interpreter during Mr. Taniguchi's deposition. JA 50, 103, 107. The remaining $5,257.20 were amounts that Kan Pacific had paid Mr. Jones, who did not orally interpret any proceedings in the case, for his document translation services. JA 58-61 (Colin P.A. Jones transactions

totaling $5,257.20). The district court taxed the entire amount, $5,517.20, as "compensation of interpreters" under subsection 1920(6). Pet. App. 21a-22a.

On Mr. Taniguchi's appeal, the Ninth Circuit affirmed the costs award in a published opinion. *Id.* at 1a-8a. The panel held that, under subsection 1920(6), "the prevailing party should be awarded costs for services required to interpret either live speech or written documents into a familiar language, so long as interpretation of the items is necessary to the litigation." *Id.* at 7a.

The Ninth Circuit noted that the Seventh Circuit, in *Extra Equipamentos E Exportação Ltda. v. Case Corp.*, 541 F.3d 719 (7th Cir. 2008), had held that "'interpretation' and 'translation' have distinct meanings," reasoning that the "common understanding of an 'interpreter' [w]as one who translates the spoken word rather than the written word." Pet. App. 5a-6a (quoting *Extra Equipamentos*, 541 F.3d at 727-28). Nevertheless, the Ninth Circuit aligned itself with several other circuits, including the Sixth, which reached a contrary conclusion in *BDT Products, Inc. v. Lexmark International, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005). Pet. App. 6a-7a.

The Ninth Circuit determined that "the word 'interpreter' can reasonably encompass a 'translator,' both according to the dictionary definition and common usage of these terms, which does not always draw precise distinctions between foreign language interpretations involving live speech versus written documents." Pet. App. 7a. The court found this conclusion to be more compatible with Federal Rule

of Civil Procedure 54, which, it stated, "includes a decided preference for the award of costs to the prevailing party." *Id.* The Ninth Circuit thus found that "the district court acted within its discretion when it determined that translation services were necessary to render pertinent documents intelligible to the litigants." *Id.* at 8a.

In a separate, unpublished memorandum disposition, the Ninth Circuit affirmed the district court's entry of summary judgment for Kan Pacific. Pet. App. 9a-11a.

SUMMARY OF ARGUMENT

I. The Ninth Circuit erred in ruling that document translators are "interpreters" whose compensation may be taxed under subsection 1920(6). The word "interpreter" refers to one who facilitates the comprehension of spoken proceedings by communicating content in real time during such proceedings. That word does not extend to one who translates written documents.

A. Many authorities confirm the common-sense proposition that "[i]f a judge translated the French Code of Criminal Procedure into English, we would not say that he had 'interpreted' the French code into English." *Extra Equipamentos*, 541 F.3d at 728. Moreover, the interpreters' professional literature distinguishes between interpretation, which applies to live, oral proceedings, and translation, which is used primarily in the context of written documents. *See infra* at 16-23.

A wide variety of federal executive and administrative agencies also recognize this distinction between interpreters and translators. Most directly relevant, the Administrative Office of

the United States Courts has explained that the Court Interpreters Act does not address the translation of documents. *See infra* at 23. Other federal agencies, including the Department of Justice, recognize the same distinction in other contexts. *See infra* at 23-35.

B. The Court Interpreters Act, which codified subsection 1920(6), confirms the limited meaning of the term "interpreter" through its text and structure. The primary provision of that law promulgated two sections of United States Code addressing in-court, spoken interpretation services to be conducted in either the "simultaneous," "consecutive," or "summary" mode, all of which are means of oral interpretation inapplicable to the translation of written documents. *See infra* at 26-28. The same word "interpreter" naturally carries the same meaning in the costs provision of the same statute. This meaning is consonant with the use of the word in rules addressing interpreters that antedate subsection 1920(6). *See infra* at 29-30.

The exclusion of document translators from the word "interpreter" is also reflected in a congressional convention extending well beyond the Court Interpreters Act to a large number of statutes throughout the United States Code. These provisions demonstrate a consistent congressional practice of using the words "interpreter" and "translator" together where both the spoken and written modes are intended to be included. *See infra* at 30-33. The Ninth Circuit's construction of the word "interpreters" as including written document translators collapses this consistent statutory distinction.

II. While the foregoing textual and structural considerations conclusively resolve the issue, any ambiguity should be resolved against inclusion of written document translation.

A. The legislative history confirms that the Congress intended the statute to exclude document translation. Several provisions of the legislative history expressly indicate that the statute was understood to address oral interpretation of proceedings. And the Congress considered, but rejected, a provision requiring the translation of certain documents in the District of Puerto Rico, and providing that the costs of that translation could be imposed upon the parties. *See infra* at 33-36.

B. Even if subsection 1920(6) had been ambiguous, a narrow construction would still have been appropriate. "At common law, costs were not allowed." *Alyeska Pipeline*, 421 U.S. at 247. And the common law "ought not to be deemed to be repealed, unless the language of a statute [is] clear and explicit." *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812). *See infra* at 36-37.

III. The plain statutory language represents a sound policy judgment. Excluding document translation expenses from taxable costs avoids the danger of large costs awards that can deter meaningful access to the courts, particularly on the part of the poor. It also fosters international comity by minimizing the discovery-related expenses incurred by foreign nationals in United States litigation, which has been a longstanding concern expressed by a number of foreign sovereigns. *See infra* at 37-41.

IV. The Ninth Circuit's reasoning in support of its contrary conclusion is incorrect. The court of appeals relied principally on the view that the word "interpreters" lacks a clear and determinate meaning. Pet. App. 7a. That conclusion is inconsistent with many different authorities. The court of appeals also opined that an expansive reading of the term is more compatible with Federal Rule 54 of the Federal Rules of Civil Procedure. Pet. App. 7a. To the contrary, however, "[t]he discretion granted by Rule 54(d) is not a power to evade th[e] specific congressional" limits on cost awards. *Crawford Fitting*, 482 U.S. at 442. *See infra* at 41-43.

ARGUMENT

I. THE STATUTE'S PLAIN MEANING FORECLOSES THE TAXATION OF DOCUMENT TRANSLATION COSTS

A. The Word "Interpreters" Does Not Apply to Translators of Written Texts

The Ninth Circuit erred in ruling that document translators are "interpreters" for purposes of subsection 1920(6). Many lexical authorities make clear that those who engage in written document translation are not acting as "interpreters," so the statute's enumeration of costs for "interpreters" does not authorize the award of costs for document translation services.

1. "*Interpretation* almost universally refers to the transfer of meaning from one language into another for the purpose of *oral* communication between two persons who do not share the same language." Roseann Dueñas González, Victoria F. Vásquez, &

Holly Mikkelson, FUNDAMENTALS OF COURT INTERPRETATION 33-34 (1991) (emphases in original).

The word "translation," by contrast, most commonly refers to reading a written text and drafting a new written document using the corresponding terms of a different language. *See, e.g.*, Elena M. de Jongh, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 35 (1992) ("*Translation* generally refers to the transfer of thoughts and ideas from one language (the source language) to another (the target language) by means of the written word." (emphasis in original)). The word "translation" can also sometimes be used in a broader, generic sense that includes "transferring meaning from one language to another—whether in spoken or written form." González, Vásquez, & Mikkelson, *supra*, at 33. Under this latter, broader definition of "translation," interpreting is a proper subset limited to the spoken mode. But whether "translation" is used in its broad or narrow sense, the word "interpreter" refers to one engaged in spoken interpretation in real time.

A variety of dictionaries define the word "interpreter" to mean "[o]ne who translates orally from one language into another." WEBSTER'S II: NEW REVISED UNIVERSITY DICTIONARY 638 (1984). *See also, e.g.*, Jack P. Friedman, DICTIONARY OF BUSINESS TERMS 343 (4th ed. 2007) ("person who translates orally foreign languages for people using different languages"); WEBSTER'S COLLEGIATE DICTIONARY 654 (11th ed. 2003) ("one that interprets: as (a): one who translates orally for parties conversing in different languages"); Hadumod Bussmann, ROUTLEDGE DICTIONARY OF LANGUAGE AND LINGUISTICS 584

(1996) (defining "interpreting" as "[t]he practice of (oral) translation of one language into another"); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 943 (3d ed. 1992) ("one who translates orally from one language into another"); OXFORD AMERICAN DICTIONARY 346 (1980) ("a person whose job is to translate a speech etc. into another language, orally in the presence of the speaker"); William Morris, ed., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 685 (1978) ("One who translates orally from one language into another"); Edwin B. Williams, ed., THE SCRIBNER-BANTAM ENGLISH DICTIONARY 476 (1977) (defining "interpret" as "to translate orally"); FUNK & WAGNALLS COMPREHENSIVE STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 323 (1921) (defining "interpreter" as "one who interprets," and "interpret" as "translate orally"); THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 429 (1917) ("one whose office it is to translate orally in their presence the words of persons speaking different languages").

Several dictionaries expressly indicate that an application of the word "interpreter" to one who translates written documents is obsolete. *See, e.g.*, THE CHAMBERS DICTIONARY 841 (2006) ("a person who translates orally for the benefit of two or more parties speaking different languages," and "a translator of written texts (*obs.*)"); 7 THE OXFORD ENGLISH DICTIONARY 1132-33 (1989) ("[o]ne who translates languages," divided into two senses: "a. A translator of books or writings (obs.)," and "b. One who translates the communications of persons speaking different languages; *spec.* one whose office

it is to do so orally in the presence of the persons; a dragoman").[5]

Legal dictionaries reflect the same meaning. BLACK'S LAW DICTIONARY, in the relevant edition current when subsection 1920(6) was enacted in 1978, defines "interpreter" as "[a] person sworn at a trial to interpret the evidence of a foreigner or a deaf and dumb person to the court." Henry Campbell Black, BLACK'S LAW DICTIONARY 954 (4th ed. 1968). Other law dictionaries have long used similar definitions. *See, e.g.*, Peter Hodgson Collin, DICTIONARY OF LAW 127 (1999) ("person who translates what someone has said into another language; *my secretary will act as interpreter; the witness could not speak English and the court had to*

[5] Kan Pacific has observed that some other dictionary definitions frame the definition of "interpreter" as applying "especially" to the context of vocal utterances, thus seemingly leaving open the possibility of its application in other instances as well. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1182 (1976) (defining "interpreter" as "one that translates; *esp.*: a person who translates orally for parties conversing in different tongues"). But the abbreviation "*esp.*" in a dictionary definition is a term of art that ordinarily connotes the most common meaning of the defined term. *See* 12,000 WORDS: A SUPPLEMENT TO WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 15a (1986) ("The sense divider *esp* (for especially) is used to introduce the most common meaning subsumed in the more general preceding definition."); *accord, e.g.*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 20a (11th ed. 2004) (same); MERRIAM-WEBSTER'S DICTIONARY OF LAW xv (1996) (same). And the "most common meaning" of a statutory term ordinarily controls for purposes of statutory interpretation in the absence of affirmative evidence to the contrary. *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 301 (1989). *See, also, e.g., Muscarello v. United States*, 524 U.S. 125, 128-31 (1998) (construing statutory term in keeping with its "primary meaning").

appoint an interpreter"); James A. Ballentine, A LAW DICTIONARY OF WORDS, TERMS, ABBREVIATIONS AND PHRASES WHICH ARE PECULIAR TO LAW AND OF THOSE WHICH HAVE A PECULIAR MEANING IN THE LAW 247 (1916) ("[o]ne sworn to interpret the testimony of [a] witness who testifies in a cause"); William C. Anderson, A DICTIONARY OF LAW 565 (1889) ("[o]ne who translates the testimony of witnesses speaking a foreign tongue, for the benefit of the court and jury"); 1 Benjamin Vaughan Abbott, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE 639-40 (1879) ("one who restates the testimony of a witness testifying in a foreign tongue, to the court and jury, in their language").

These dictionaries reflect the common-sense proposition that, in its ordinary meaning, "[a]n interpreter as normally understood is a person who translates living speech from one language to another." *Extra Equipamentos*, 541 F.3d at 727. "Robert Fagles made famous translations into English of the ILIAD, the ODYSSEY, and the AENEID, but no one would refer to him as an English-language 'interpreter' of these works." *Id.* Using the word "interpreter" in the latter sense would, in short, be "much less natural." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). This common-sense understanding matters, because "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006); *see also Watson v. United States*, 552 U.S. 74, 78 (2007) (rejecting meaning of statutory term not consonant with "regular English").

2. Furthermore, the word "interpreter" carries a well-understood meaning among the community of

professional court interpreters, which reinforces the exclusion of written document translation. In construing a statute, "technical terms of art should be interpreted by reference to the trade or industry to which they apply." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 372 (1986). Even if a word can, in some contexts, have a broader meaning, it can be limited to a narrower and more precise meaning in the context of a statute where it "has a different and much more specific meaning in the language of" the professional community at issue. *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974). In short, the relevant "technical literature" can supply more precise meanings applicable to a statutory term. *Utah v. Evans*, 536 U.S. 452, 467 (2002).

The professional literature addressing the subject of judicial interpreting draws a distinction between the vocal and written modes, applying the term "interpreter" to the former. *See, e.g.*, de Jongh, *supra*, at 35 ("The term 'translation,' therefore, refers to the processing of written language while 'interpretation' refers to the processing of spoken language."); Geoffrey Samuelsson-Brown, A PRACTICAL GUIDE FOR TRANSLATORS 6 (4th ed. 2004) ("The professions of translation and interpreting are significantly different but there are areas where the two overlap."). This differentiation is far from arbitrary; interpretation and translation involve "different skills that not everyone is capable of mastering equally; in other words, some individuals possessing the prerequisite linguistic skills are better at translating than interpreting, and vice-versa." Holly Mikkelson, INTRODUCTION TO COURT INTERPRETING 77 (2000). *See also, e.g.*, Morry Sofer, THE TRANSLATOR'S HANDBOOK 125 (7th ed. 2009)

(noting that interpreting and translating "represent two distinct ways of working with language"). The two activities "differ from each other in several ways," and "[t]he basic differences in the use of the oral versus the written mode have several ramifications." de Jongh, *supra*, at 36.

For instance, a written document "is contained in a permanent setting. This text, regardless of its quality, is static, immutable in its form and fixed in time." *Id.* (internal quotation marks omitted). "Interpreting, however, represents an entirely different operation," because "a spoken message . . . must be immediately transformed and communicated orally in the target language." *Id.* Thus, "[t]ranslators have time to reflect and craft their output, whereas interpreters must instantaneously arrive at a target language equivalent, while at the same time searching for further input." González, Vásquez, & Mikkelson, *supra*, at 295. *Accord* Samuelsson-Brown, *supra*, at 7 ("An interpreter interprets the spoken word and does not have the luxury of time nor a second chance to revise the result of the interpretation.").

Moreover, unlike a translator of written material, "the interpreter is present with both speaker and listener(s) and participates in a dialogue." de Jongh, *supra*, at 36. "Since interpreters, unlike translators, regularly interact with people under less than easy conditions, it is important for interpreters to have a gregarious and pleasing personality, a good appearance, good manners, patience, social savvy, and a good sense of humor." Sofer, *supra*, at 130.

Translation also differs from interpretation because it ordinarily occurs in a single direction, from

one language to another with respect to a document, and not both ways, as in the course of an interpreted conversation. *See, e.g.*, Nina L. Ivanichvili, *Considerations in Selecting Interpreters and Translators*, 39 COLO. LAW. 39, 41 (2010) (noting that translators, unlike interpreters, "translate documents only in one direction, most often into their native or dominant language").

The interpreter and the translator can also have different communicative purposes. "[W]hen interpreting legal terms or expressions, the court interpreter is concerned not only about the accuracy or adequacy of the interpretation, but also the comprehensibility and acceptability of the interpretation." Eva N.S. Ng, "The Tension Between Adequacy and Acceptability in Legal Interpreting and Translation," *in* Sandra Hale, Uldis Ozolins, & Ludmila Stern, eds., THE CRITICAL LINK 5: QUALITY IN INTERPRETING—A SHARED RESPONSIBILITY 37, 41 (2009). "In legal translation, however, due to the requirement to maintain terminological consistency in the statutes, such flexibility is to a large extent restricted." *Id.*

The distinction between the oral and written modes is further illustrated by the difference between the treatment of written texts presented in the course of live judicial proceedings, and those translated at leisure outside of such proceedings. If a document is presented in open court, an interpreter can engage in "[s]ight interpreting or sight translation, as it is also known," Marianne Mason, COURTROOM INTERPRETING 6 (2008), which is "the oral rendition into a target language of material written in the source language." de Jongh, *supra*, at 37.

Because this process occurs in the course of a real-time proceeding, "the same component skills that go into simultaneous interpreting, i.e., quick reflexes and mental agility, plus the ability to monitor one's own output while carefully attending to the original, are required for sight translation." Mikkelson, *supra*, at 76. In particular, the spoken language produced in sight interpreting can be significantly different in its content from a written translation of the same document. *See, e.g., id.* at 76-77 (noting that "conver[sion of] a message that was originally intended to be read into one that can be understood in oral form" might involve changes such as "breaking up long, convoluted sentences into shorter, more direct statements, as well as using stress and intonation to clarify meaning"). By contrast to sight interpretation, the translation of written documents between languages is an "[a]ncillary" task, not itself properly part of interpretation. *Id.* at 77. "Unfortunately," "laypersons are often unaware of th[e] distinction" between interpreting and translating, and it is consequently "important for interpreters to candidly assess their translation ability and to turn down translation assignments if they feel they cannot perform the task adequately." *Id.*

Leading professional organizations in the areas of interpreting and translating similarly emphasize that interpreters and translators are different, and serve essentially distinct functions. The National Association of Judiciary Interpreters and Translators (the "NAJIT") explains that "[i]nterpretation is the process by which *oral* communication is rendered from one language to another," while "[t]ranslation is the process by which *written* text is rendered from

one language into another." http://www.najit.org/certification/faq.php#difference (last visited Nov. 18, 2011) (emphases in original). It emphasizes that

> [i]nterpretation and translation, while both language-related, are not identical disciplines. Each requires specific knowledge, training, and practice. Credentialing is different for each domain. Some practitioners are equally adept at both; others specialize in one discipline or the other.

Id.

One NAJIT publication explains that interpretation and translation require "[c]ompletely different skills." Bench & Bar Committee of Nat'l Ass'n of Judiciary Interpreters & Translators, "Interpreting in a Legal Setting: A Guide for the Attorney," at 3 (2011), *available at* http://www.najit.org/documents/bandb/BBpowerpoint.pdf (last visited Nov. 18, 2011). Another NAJIT publication, its "Information for Court Administrators," notes that "[t]ranslators and interpreters are not interchangeable since different skills and experience are needed for each," and warns "[n]ever [to] assume that a translator can act as an interpreter and vice versa." NAJIT Position Paper, "Information for Court Administrators," at 2 (2003), *available at* http://www.najit.org/publications/Court%20AdministratorFINAL.pdf (last visited Nov. 18, 2011).

The American Translators Association (the "ATA") similarly explains: "A *translator* works with the written word, transferring *text* from a source language into a target language," while "[a]n *interpreter* works with the spoken word, transferring

speech from a source language into a target language." http://www.atanet.org/onlinedirectories/individuals.php (last visited Oct. 7, 2011) (emphases in original). An article in the ATA Chronicle explains that, "[a]lthough some translators interpret and some interpreters translate, the two activities are distinct," and recites different skills associated with each of the two activities. Frank Johnson, "Being Bilingual is Not Enough," Featured Article from the ATA Chronicle (July 2008), *available at* http://www.atanet.org/chronicle/feature_article_july2008.php (last visited Nov. 18, 2011).

The ATA web site hosts a video inviting viewers to "[d]iscover the difference between interpreting and translating, and why this is an increasingly important profession in today's world." *A Day in the Life of a Translator/Interpreter*, *available at* http://www.atanet.org/careers/career_video.php (last visited Nov. 18, 2011). The video, in turn, explains that "[i]t's very basic—interpretation is oral, and translation is written," *id.* (video at 0:36-0:42), and illustrates the practice of the two activities, *id.* (video at 0:43-4:15). And the ATA's twin guides for consumers retaining interpreters and translators, respectively, contain identical pages explaining: "**Q: Translation, interpreting—what's the difference? A: Translators write, interpreters speak**," and reiterating that "[i]f you are working with written documents . . . you need a *translator*," while "[i]f you want to interact with people in a foreign language on the spot . . . you need an *interpreter*." American Translators Association, "Interpreting, Getting it Right: A Guide to Buying Interpreting Services," at 3, *available at* http://www.atanet.org/docs/Getting_it_right_int.pdf (last visited Nov. 18, 2011)

(bold and italics in original); American Translators Association, "Translation, Getting it Right: A Guide to Buying Translation," at 3, *available at* http://www.atanet.org/docs/Getting_it_right.pdf (last visited Nov. 18, 2011) (bold and italics in original).

3. Federal executive and administrative agencies routinely maintain the same distinction. The federal GUIDE TO JUDICIARY POLICY, promulgated by the Administrative Office of the United States Courts pursuant to authority delegated by the Court Interpreters Act itself,[6] explains that "[t]he Court Interpreters Act does not address written translation requirements, and the Federal Court Interpreter Certification Examination (FCICE) . . . does not test for translation skills." 5 GUIDE TO JUDICIARY POLICY: COURT INTERPRETING [hereinafter GUIDE TO JUDICIARY POLICY] § 550.20.10(a). It explains that "[q]ualified translators can be located through the American Translators Association or any other organization that tests translation ability," *id.* § 550.20.10(b), and reiterates that "[t]ranslations and transcriptions are not within the scope of the Court Interpreters Act, and payment for such services is not funded from the general authorization for contract court interpreting." *Id.* § 550.20.40.

The Department of Justice addresses the same distinction in its guidance regarding Title VI obligations of federal financial-assistance recipients. After notice and comment, in 2002, the Department promulgated this document, which explains that "[i]nterpretation is the act of listening to something

---

[6] *See* 28 U.S.C. § 1827(b)(1) ("The Director [of the Administrative Office of the United States] shall issue regulations to carry out this paragraph . . . .").

in one language (source language) and orally translating it into another language (target language)," while "[t]ranslation is the replacement of a written text from one language (source language) into an equivalent written text in another language (target language)." Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,460-63 (June 18, 2002). The document goes on to provide separate criteria and considerations for aid recipients with respect to these two different services. *Id.* at 41,460-64.

The Federal Interagency Working Group on Limited English Proficiency includes "representatives of more than 35 federal agencies," and serves to address the needs of non-English speakers "in a consistent and effective manner across agencies," collecting "the best thinking from" a variety of different parts of government. http://www.lep.gov/iwglep.htm (last visited Nov. 18, 2011). That interagency working group also emphasizes that interpreters and translators are essentially different. Its guide specifies that "[t]he following are commonly accepted definitions of 'translation' and 'interpretation.' Translation is the process of *transferring ideas expressed in writing from one language to another language.* Interpretation is the process by which *the spoken word is used when transferring meaning between languages.*" Federal Interagency Working Group on Limited English Proficiency, *On Choosing a Language Access Provider*, *available at* http://www.justice.gov/crt/lep/resources/leptatool.pdf,

at 1 (last visited Nov. 18, 2011) (emphases and underlining in original). Individual federal agencies apply the same distinction, *see, e.g.*, *Interpreters and Translators, Occupational Outlook Handbook*, *available at* http://www.bls.gov/oco/ocos175.htm (last visited Nov. 18, 2011) (Bureau of Labor Statistics document explaining that "interpreting and translation are different professions" because "[i]nterpreters deal with spoken words [and] translators with written words"), as do State judicial documents, *see, e.g.*, Michael L. Bender, Chief Justice, Supreme Court of Colorado, "Directive Concerning Language Interpreters and Access to the Courts by Persons with Limited English Proficiency," at 1-2 June 2011, *available at* http://www.justice.gov/crt/about/cor/agreements/CJD_06-03_Signed.pdf (last visited Nov. 16, 2011) (defining "[i]nterpretation" as "[t]he accurate and complete transfer of an oral message from one language to another in real time," and "[t]ranslation" as "[t]he accurate and complete transfer of a written message from one language to another that may take place over time").

B. The Structure of the Court Interpreters Act, and the United States Code as a Whole, Make Clear That Document Translators Are Not "Interpreters" For Purposes of the Statute

The structure and context of the statute confirms the plain meaning of the word "interpreters." *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (holding that "the words of a statute must be read in their context and with a view

to their place in the overall statutory scheme" (internal quotation marks omitted)).

1. The Congress enacted subsection 1920(6) as part of the Court Interpreters Act. The main substantive provision of that statute was section 2, which promulgated machinery for the certification and use of interpreters in certain cases in federal court. Section 2 did so by adding two new sections to the United States Code. The first, codified at 28 U.S.C. § 1827, established procedures for the Director of the Administrative Office of the United States Courts to "facilitate the use of interpreters" in federal courts, Pub. L. No. 95-539 § 2 (codifying § 1827(a)), through the certification and other qualification of interpreters, *id.* (codifying § 1827(b)-(c)), and for their use in certain "action[s] initiated by the United States," *id.* (codifying § 1827(d)). The second, 28 U.S.C. § 1828, provided for the establishment of "a program for the provision of special interpretation services" in certain "multidefendant . . . actions" initiated by the United States. *Id.* (codifying § 1828(a)).

The "interpreters" in both of these substantive sections provide in-court, spoken services. Section 1827 provides that interpretation under that section must be conducted in either the "simultaneous" or "consecutive mode," 28 U.S.C. § 1827(k), and the special interpretation services under section 1828 must be "simultaneous," *id.* § 1828(a). As shown above, *see supra* note 4, the simultaneous, consecutive, and summary modes are all methods of interpretation that apply to live proceedings, and that are wholly inapplicable to the translation of written documents outside the courtroom. As such,

the Director of the Administrative Office of the United States Courts—who was charged with both "issu[ing] regulations" addressing who may be certified or otherwise qualified to serve as an interpreter under the statute, *id.* § 1827(b)(1), and "establish[ing]" the special interpretation services program, *id.* § 1828(a)—has confirmed that "[t]ranslations and transcriptions are not within the scope of the Court Interpreters Act." GUIDE TO JUDICIARY POLICY § 550.20.40; *accord id.* § 550.20.10(a) (explaining that "[t]he Court Interpreters Act does not address written translation requirements").

Because the primary, substantive provisions set out in section 2 of the Court Interpreters Act use the word "interpreter" in a manner limited to oral, in-court interpretation, the same word in section 7 of that statute, which created subsection 1920(6), naturally carries the same meaning. *See, e.g.*, *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted)); *Roadway Express*, 447 U.S. at 760 (holding that the same word "costs" appearing in sections 1920 and 1927 of 28 U.S.C. "should be read together as part of the integrated statute approved in 1853" to carry the same meaning).

2. Kan Pacific has not disputed that sections 1827 and 1828 provide only for oral interpretation. Rather, it has urged that the word "interpreters" should be assigned a different meaning in subsection 1920(6) than in sections 1827 and 1828 because, it

says, "Section 1920(6) has a broader scope than Sections 1827 and 1828." Respondent's Br. in Opposition 9. Kan Pacific's observation that the costs provision may apply even in cases where sections 1827 and 1828 are inapplicable (*e.g.*, because they were not brought by the United States) misses the point. All three provisions address the subject of court interpreting. Even though they differ in their content and scope, the use of a common term in all three sections of the same statute naturally indicates that the common word shares the same meaning in all three provisions. Similarly, the separate inclusion of a different costs category in subsection (6), the "[c]ompensation of court appointed experts," does not support reading the word "interpreters" differently from that term's occurrence elsewhere in the same statute.

This conclusion is further confirmed by the separate occurrence of the same statutory term elsewhere within subsection 1920(6) itself. Subsection (6) enumerates both "compensation of interpreters" and, separately, "salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." As shown above, the "special interpretation services under section 1828" involve spoken, simultaneous interpreting. Because section 1920(6) includes a second occurrence of a cognate of the word "interpreters" that is unambiguously limited to spoken proceedings, Congress's use of the same term in the same section presumptively carries the same meaning. *See Sorenson*, 475 U.S. at 860. This presumption is particularly strong because the two related terms bear an "interrelationship and close proximity" in the

statutory text. *Comm'r of Internal Revenue v. Lundy*, 516 U.S. 235, 250 (1996).

3. The limitation of subsection 1920(6) to oral interpretation is also confirmed by the use of the word "interpreter" in procedural rules dealing with interpreters. Rule 43(d) (previously, Rule 43(f)) of the Federal Rules of Civil Procedure antedates the Court Interpreters Act and authorizes the taxation as costs of the "compensation" of an "interpreter" in the special case where the district court itself "appoint[s] an interpreter of its choosing." Rule 604 of the Federal Rules of Evidence "implements" Rule 43(d), Fed. R. Evid. 604 Adv. Comm. note, and provides that an interpreter is subject to the expert-qualification and oath or affirmation requirements of the Rules.

For purposes of Rules 43(d) and 604, "an 'interpreter' is a person who renders intelligible a statement made in a courtroom by a person whose statement would not otherwise be intelligible to others in the courtroom without the services of the interpreter." 27 Charles Alan Wright & Victor James Gold, FEDERAL PRACTICE AND PROCEDURE § 6053, at 352 (2007). As such, interpreters under Rule 43(d) "can perform three different functions," all of which involve interpreting live proceedings in real time: first, communicating "where a speaker makes a statement in English but is unable to speak loud enough or distinctly enough to be understood"; second, communicating "where the statement is not spoken but is communicated through the use of gestures or a sign language, such as that employed by some deaf persons"; and third, "most common[ly]," communicating "where the statement to be translated is audible but is not understandable to the

listener because it is in a language foreign to the listener or is in English but employs jargon or code words with which the listener is unfamiliar." *Id.* § 6053, at 354-55.

Thus, the word "interpreter" in Rules 43 and 604 excludes translators of written documents, and the word should similarly be so read in subsection 1920(6). For this reason, too, the broader context of the statute makes clear that the word "interpreter" in subsection 1920(6) does not include one who translates written documents.

4. More generally, the limitation of the word "interpreter" to one engaging in live, oral interpretation is part of a broader congressional convention extending throughout the United States Code. Throughout the Code, the Congress adheres to the same distinction between "interpreters" and "translators" made by the Administrative Office under the statute, the Department of Justice, federal agencies, and the community of professional interpreters.

For instance, 15 U.S.C. § 649 specifically refers to the different modes connoted by the two terms, providing that the Office of International Trade shall give preference in hiring to bilingual employees who, *inter alia*, "translate documents" and "interpret conversations." 15 U.S.C. § 649(b)(4)(B). Numerous other provisions of the Code implement the same distinction by including both terms together where the Congress has elected to include both the oral and written modes in legislation. *See, e.g.*, 8 U.S.C. § 1555(b) (specifying that INS appropriations "shall be available for payment of . . . interpreters and translators who are not citizens of the United

States"); 10 U.S.C. § 1588(a)(7) (authorizing Secretary of Defense to accept "[v]oluntary translation or interpretation services offered with respect to a foreign language"); 10 U.S.C. § 1596b(e)-(f) (providing that Secretary of Defense shall designate foreign languages for which there is "a shortage of experts in translation or interpretation available" and defining "linguistic services" as "translation or interpretation of communication in a foreign language"); 22 U.S.C. § 2695a(a) (authorizing Secretary of State to charge agencies for providing "foreign language translation and interpretation services"); 28 U.S.C. § 530C(b)(1)(I) (providing that funds may be used for the "[p]ayment of interpreters and translators who are not citizens of the United States"); 42 U.S.C. § 254b(j)(1) (authorizing grants for provision of "translation, interpretation, and other such services" to health centers with substantial non-English-speaking patients); 42 U.S.C. § 300mm-4(a)(1)(E) (providing for World Trade Center Program Administrator to enter contracts "for the provision of translational and interpretative services for program participants who are not English language proficient"); 42 U.S.C. § 1396b(a)(2)(E) (including in State grant computations certain amounts "attributable to translation or interpretation services"); 42 U.S.C. § 1397ee(a)(1)(D)(iv) (including in State payment computations certain amounts "for translation or interpretation services"); 42 U.S.C. § 2991b-3(b)(2) (specifying that grants may be used for "the establishment of a project to train Native Americans to teach a Native American language to others or to enable them to serve as interpreters or translators of such language").

Moreover, those provisions of the United States Code that describe the role of an "interpreter" for particular purposes limit its meaning to the interpretation of live testimony. *See, e.g.*, 26 U.S.C. § 44(c)(2)(B) (specifying that "interpreters" "mak[e] aurally delivered materials available to individuals with hearing impairments"); 42 U.S.C. § 12103(1)(A) (defining "auxiliary aids and service" to include "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments"). By contrast to the sections cited in the previous paragraph, these latter provisions do *not* include the word "translators" in referring to such non-written interpretation services. And the Code is wholly devoid of any corresponding definition of "interpreter" extending to the translation of written documents.

The Congress's consistent distinction between "interpreters" and "translators" would be obliterated by construing "interpreters" to include translators. Accordingly, the pattern of congressional usage throughout the United States Code gives further reason to conclude that the word "interpreters" in section 1920 carries its usual meaning, excluding those who engage in written translation. *See, e.g.*, *Director OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 129-30 (1995) (where "the United States Code displays throughout" a consistent meaning, that meaning is presumptively applicable). The Court has applied this principle in the context of costs. In *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), the Court held that a consistent distinction between two statutory terms embodied in "[a]t least 34 statutes in 10 different

titles of the United States Code," *id.* at 89, demonstrated "beyond question" that the occurrence of one of the distinguished terms in 42 U.S.C. § 1988 does not include the other, *id.* at 88-92.

II. ANY AMBIGUITY SHOULD BE RESOLVED IN FAVOR OF MR. TANIGUCHI'S POSITION

A. The Legislative History Confirms the Limitation to Spoken Interpretation

Because the text and structure of the statute leave no doubt about the meaning of the word "interpreters" in subsection (6), there is no need even to consider the legislative history. But to the extent it has any role to play, the legislative history further confirms that plain meaning.

First, the Congress passed the Court Interpreters Act in response to several judicial decisions indicating that "the sixth amendment to the Constitution requires that non-English speaking defendants be informed of their right to *simultaneous* interpretation of *proceedings* at government expense." H.R. Rep. No. 95-1687, at 3 (1978) (emphases added). The statute was thus directed toward ensuring parties' comprehension of "the language used in the courtroom." S. Rep. No. 95-569, at 3 (1977). The legislation's original sponsor in the Senate, John Tunney, explained that the original bill was designed to provide "oral translation of all Federal courtroom proceedings," *The Bilingual Courts Act: Hearings Before the Subcomm. on Improvements on Judicial Machinery of the S. Comm. on the Judiciary*, 93d Cong. 17 (1973), "in a manner very similar to the method used by the United Nations," 119 Cong. Rec. 14,449 (May 7, 1973).

Second, documents and testimony received by the Congress recognized the oral character of interpretation. For instance, the subcommittee considering the bill received a document produced by the American Association of Language Specialists separately specifying the "WORKING CONDITIONS FOR INTERPRETERS" and the "WORKING CONDITIONS FOR TRANSLATORS," providing that interpreters should "[s]atisfy themselves that they can see and hear properly," while translators' materials "shall be typewritten or typeset and legible in all respects." *Court Interpreters Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 150-51 (1978) [hereinafter "Hearing Record"]. It heard testimony of the President of the Court Interpreters Association of New York emphasizing that "[t]he interpreter must become a mimic and an actor so as to convey to the court the emotion, mood, and attitude of a defendant or witness, as well as to correctly interpret his responses." *Id.* at 80 (testimony of Paulette Harary). And it heard testimony explaining that "[i]nterpreters in simultaneous translations have difficulties and are under pressure to get on with the proceedings. Translators working in the unhurried environment of their privacy can produce better translations." *Id.* at 369 (statement of Miguel E. Herrero Frank).

Third, the Congress considered a draft of the legislation that included a provision addressing limited document translation, but deleted that provision after receiving testimony expressing concern about the cost of such written translation. A version of the bill contained a provision (a) authorizing Spanish-language proceedings in the

District of Puerto Rico, (b) requiring that Spanish-language portions of the record in such cases "be translated into the English language" for appeal, and (c) providing that the "[t]he cost of the translation shall be paid by the district court or by the parties, as the judge may direct." H.R. 10228 § 3, 95th Cong. (1st Sess. 1977). This provision unambiguously referred to translation of written materials, used the word "translation," rather than "interpretation," to do so, and expressly authorized the allocation of such costs to the parties.

The House Subcommittee of Civil and Constitutional Rights heard testimony addressing this provision from Frank Coffin, the Chief Judge of the First Circuit, who warned that such a translation obligation would, among other problems, entail "ominous" increases in the "costs of preparing a record on appeal." Hearing Record at 92. Chief Judge Coffin discussed this "prospect of increased costs," noting that the cost of translating a single page of a transcript was "over four times the cost" of transcribing the material in the first instance, and warning that "an appeal involving a thousand page transcript would cost either a party or the United States $6,000 to $7,000 in addition to ordinary costs." *Id.* at 93. Shortly after hearing this testimony, the subcommittee deleted these provisions from the bill. H.R. Rep. No. 95-1687 at 2. Having considered and rejected a far more cabined proposal specifically permitting the assignment of certain translation costs to parties in only a single district, the Congress cannot reasonably be imagined to have adopted a far more expansive provision permitting taxation of translation costs to parties in subsection 1920(6).

Fourth, by contrast, no statement in the legislative history indicates that subsection 1920(6) was to apply to the translation of written materials. Accordingly, the legislative history confirms that the Congress had no atextual understanding of this provision.

B. Cost-Shifting Statutes Are in Derogation of the Common Law and Must Be Narrowly Construed

Even if subsection (6) were ambiguous, it should be construed narrowly as a statute in derogation of the common law.

"At common law, costs were not allowed." *Alyeska Pipeline*, 421 U.S. at 247. *Accord, e.g.*, *Lowe v. Kansas*, 163 U.S. 81, 85 (1896); *Antoni v. Greenhow*, 107 U.S. 769, 781 (1883); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 372 (1851). *See also* Philip M. Payne, *Costs in Common Law Actions in the Federal Courts*, 21 VA. L. REV. 397, 397 (1934) ("By the common law, no costs were awarded to either party, *eo nomine*, in any action."). While the taxation of costs has long been permitted by statute, such enactments are in derogation of the common law.

"The common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 623. Thus, Congress must "'speak directly' to the question addressed by the common law" in order to effect a change in it. *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), and *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981)).

While the language and structure of the Court Interpreters Act make abundantly clear that the

word "interpreters" does not include translators of written documents, it is all the more clear that the Congress has not "sp[oken] directly" so as to countermand the common law rule with regard to the costs of written translation.

III. THE CONGRESSIONAL DECISION TO ALLOW TAXATION OF COSTS OF INTERPRETERS BUT NOT TRANSLATORS IS SENSIBLE AS A MATTER OF POLICY

The plain statutory language results in a perfectly reasonable and sound policy regime. Like spoken interpretation, the translation of documents can play an important role in litigation. Nonetheless, there are significant differences between the interpretation of spoken proceedings and the translation of written documents outside court that warrant differential treatment with respect to the taxation of costs.

First, allowing document translation expenses to be taxed as costs would create the risk of large costs awards. The congressional costs regime represents "a decision to depart only slightly from the so-called 'American Rule,' under which parties generally bear their own expenses." *Kansas v. Colorado*, 129 S. Ct. 1294, 1298 (2009). Moreover, it has long been a primary policy of the American costs regime to avoid the possibility of large costs awards, because the risk of such liability can "discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be." *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235 (1964). Reasonable policy considerations support the judgment "that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit" by being required to pay for

the other side's attorneys' fees or, for the same reason, other large expenses. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). These concerns are particularly important to the extent that they fall on the poor, or other disadvantaged groups. *See, e.g., Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters & Joiners of Am.*, 456 U.S. 717, 725 (1982) (noting "the possible deterrent effect that fee shifting would have on poor litigants with meritorious claims," which, among other considerations, "persuade us not to infer that Congress intended to authorize" such a regime); *Fleischmann Distilling Corp.*, 386 U.S. at 718 (noting "that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel").

These policy considerations are squarely implicated by the decision whether to authorize the taxation of document translation costs. The universe of discovery documents in civil litigation can be very large. "[W]hile there is a natural limit to the expense of interpreters—the amount of time that witnesses (including deponents) undergo live examination—there is no natural limit on the number of documents that can be translated in aid of a claim or defense." *Extra Equipamentos*, 541 F.3d at 728.

In a case where a party possesses foreign-language documents, the broad latitude to conduct discovery can permit the other side wide discretion to decide how many documents to discover and translate. Because a party of limited means can often minimize its own translation expenses, but cannot control the other side's translation expenses, the taxation of such

costs can lead to uncertain and potentially large exposure to costs liability. Thus, for example, in one case, the Federal Circuit affirmed the taxation of more than $1 million in document translation expenses under subsection 1920(6). *See Ortho-McNeil Pharm., Inc. v. Mylan Labs. Inc.*, 569 F.3d 1353, 1356 (Fed. Cir. 2009). Even the prospect of much more modest translation awards, however, can deter individuals from seeking to vindicate rights in the federal courts.

The potential for large and chilling costs liability is of particular concern in the context of document translation, because the potential costs exposure would be born disproportionately by immigrants and non-English speakers, who may be particularly likely to have non-English documents. The statute's exclusion of translation expenses from recoverable costs thus tends to further the salutary end of protecting meaningful access to the courts against chilling costs burdens that might otherwise disproportionately impact potentially disadvantaged groups. *See, e.g.*, *Fleischmann Distilling Corp.*, 386 U.S. at 718 (discussing policy against avoiding regime under which "the poor might be unjustly discouraged from instituting actions to vindicate their rights").

The text of section 1920 reflects a recognition of this risk. Where costs provisions might otherwise be excessive, section 1920 provides an express limitation on their amount, permitting taxation only if the expenses were "necessar[]y" to the case. *See* 28 U.S.C. § 1920(2) ("Fees for printed or electronically recorded transcripts necessarily obtained for use in the case"); *id.* at § 1920(4) ("Fees for exemplification

and the costs of making copies of any materials where the copies are necessarily obtained for use in the case"). Subsection (6), by contrast is not cabined by any corresponding necessity limitation. It would thus be particularly unwarranted to read that subsection to include a wide-ranging authority to tax the costs associated with document translation. *See, e.g., Crawford Fitting Co.*, 482 U.S. at 444 (noting that in the costs statute, "Congress meant to impose rigid controls on cost-shifting in federal courts").

Second, permitting the taxation of the compensation of interpreters but not document translators represents a reasonable accommodation of foreign nations that have expressed concerns about the impact of United States discovery obligations upon foreign nationals. "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 Reporter's Note 1 (1987). A number of foreign nations have expressed concern about having their citizens subjected to the expense and burden of complying with expansive United States discovery, sometimes even implementing "blocking statutes" designed to restrict or prohibit compliance with such discovery obligations within their borders. *See, e.g.*, French Penal Code Law No. 80-538 (quoted in translation, *Société Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 526 n.6 (1987)). The French blocking statute, for instance, generally "prohibit[s] . . . any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial,

industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith." *Société Nationale*, 482 U.S. at 526 n.6.

In the face of such international controversy over discovery burdens and expenses, the Congress's decision to exclude the costs of written document translation from the scope of subsection (6) serves to foster comity with foreign nations. If the Congress had chosen to include document translation expenses within the scope of section 1920, foreign nationals involved in litigation in United States courts would not only be subject to the expansive document discovery objected to by some other nations, but could additionally be required to pay the potentially large cost of translating those same documents into English. It is no less reasonable for the Congress than for the courts to "seek to minimize [the] costs and inconvenience" of federal court discovery upon foreign nationals. *Id.* at 546. Indeed, Congress is presumed to have done so. *See, e.g.*, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (holding that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations," reflecting principles of customary international law "that (we must assume) Congress ordinarily seeks to follow").

IV. THE ARGUMENTS ADDUCED BY THE NINTH CIRCUIT IN SUPPORT OF ITS CONTRARY RULING ARE INCORRECT

The Ninth Circuit's reasoning in support of its conclusion that the word "interpreters" in subsection 1920(6) includes document translators is incorrect.

That court's first ground was its conclusion that ordinary usage "does not always draw precise distinctions" between interpretation and translation. Pet. App. 7a. To the contrary, however, as shown above, *see supra* at 12-25, the common usage, the usage of the relevant professional community, and numerous other authorities recognize that "interpreters" work in the context of spoken language. Moreover, a variety of statutory and contextual considerations make clear that—whatever the linguistic outer bounds of the word "interpreters"—it plainly did not extend to document translators in the context of the Court Interpreters Act. *See supra* at 25-33.

The Ninth Circuit's assertion that expanding the scope of the term "interpreters" is "more compatible with Rule 54 of the Federal Rules of Civil Procedure, which includes a decided preference for the award of costs to the prevailing party," is also misguided. Rule 54 presumptively favors the taxation of costs that are enumerated by statute. But that rule does not create a presumption that particular costs are, in fact, included within the enumeration. To the contrary, this Court has explained that "§ 1920 defines the term 'costs' as used in Rule 54(d)." *Crawford Fitting Co.*, 482 U.S. at 441. As such, "[t]he discretion granted by Rule 54(d) is not a power to evade th[e] specific congressional" limits on costs awards. *Id.* at

442. Rather, "it is solely a power to decline to tax, as costs, the items enumerated in § 1920." *Id.*; *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 301 (2006) (noting that "the term 'costs' in Rule 54(d) is defined by the list set out in § 1920"). In short, Rule 54(d) does not support an expansive reading of the word "interpreters" in subsection 1920(6).

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

DOUGLAS F. CUSHNIE
P.O. Box 500949
Saipan, MP 96950
(670) 234-6843

DONALD B. AYER
Counsel of Record
MICHAEL S. FRIED
CHRISTOPHER J. SMITH
JANE E. HOLMAN
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
dbayer@jonesday.com
(202) 879-3939
Counsel for Petitioner

November 28, 2011

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
JAN 11 2012
OFFICE OF THE CLERK

No. 10-1472

In the Supreme Court of the United States

KOUICHI TANIGUCHI,

Petitioner,

v.

KAN PACIFIC SAIPAN, LTD.,
doing business as Marianas Resort and Spa,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

THOMAS L. ROBERTS
Dooley Roberts & Fowler LLP
Orlean Pacific Plaza
Suite 201
865 S. Marine Corps Dr.
Tamuning, Guam 96913
(671) 646-1222

DAN HIMMELFARB
Counsel of Record
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
dhimmelfarb@mayerbrown.com

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

QUESTION PRESENTED

Whether "compensation of interpreters," a taxable cost under 28 U.S.C. § 1920(6), includes compensation of those who translate written as well as spoken words.

CORPORATE DISCLOSURE STATEMENT

Respondent Kan Pacific Saipan, Ltd., d/b/a Mariana Resort and Spa, has no parent corporation and no publicly held company owns 10% or more of respondent's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

STATEMENT 2

SUMMARY OF ARGUMENT 6

ARGUMENT:

THE TERM "INTERPRETERS" IN 28 U.S.C. § 1920(6) ENCOMPASSES THOSE WHO TRANSLATE WRITTEN AS WELL AS SPOKEN WORDS 11

A. The Ordinary Meaning Of "Interpreters" Includes Those Who Translate Written Words 12

B. There Are Good Reasons For Including Those Who Translate Written Words In Section 1920(6) 19

C. There Are No Good Reasons For Excluding Those Who Translate Written Words From Section 1920(6) 24

D. The Court Interpreters Act Does Not Suggest That Those Who Translate Written Words Are Excluded From Section 1920(6) 35

E. There Is No Other Persuasive Evidence That Those Who Translate Written Words Are Excluded From Section 1920(6) 44

TABLE OF CONTENTS—continued

Page

CONCLUSION 50

APPENDIX: COURT INTERPRETERS ACT 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Aerotech Res., Inc. v. *Dodson Aviation, Inc.*, 237 F.R.D. 659 (D. Kan. 2005) 26

Ali v. *Fed. Bureau of Prisons*, 552 U.S. 214 (2008) 48

Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*, 421 U.S. 240 (1975) 24, 25, 50

Arboireau v. *Adidas Salomon AG*, 2002 WL 31466564 (D. Or. June 14, 2002) 28

Atl. Cleaners & Dyers, Inc. v. *United States*, 286 U.S. 427 (1932) 46

BDT Prods., Inc. v. *Lexmark Int'l, Inc.*, 405 F.3d 415 (6th Cir. 2005) 5, 11

Bennett Chem. Co. v. *Atl. Commodities, Ltd.*, 24 F.R.D. 200 (S.D.N.Y. 1959) 30

Borja v. *Dole Food Co.*, 2002 WL 31757780 (N.D. Tex. Nov. 29, 2002), vacated, 2003 WL 21529297 (N.D. Tex. June 30, 2003) 17

Castillo v. *Teledyine Cont'l Motors, Inc.*, 2011 WL 1343051 (S.D. Fla. Mar. 16, 2011) 26

Chacon v. *El Milagro Care Ctr., Inc.*, 2010 WL 3023833 (S.D. Fla. July 29, 2010) 26

Chore-Time Equip., Inc. v. *Cumberland Corp.*, 713 F.2d 774 (Fed. Cir. 1983) 11, 26

Competitive Techs. v. *Fujitsu Ltd.*, 2006 WL 6338914 (N.D. Cal. Aug. 23, 2006) 26, 28

Conn v. *Zakharov*, 2010 WL 2293133 (N.D. Ohio June 4, 2010) 28

TABLE OF AUTHORITIES—continued

Page(s)

Crawford Fitting Co. v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) 2, 3, 27

Dattner v. *Conagra Foods, Inc.*, 2005 WL 1963937 (S.D.N.Y. Aug. 16, 2005), vacated per curiam, 458 F.3d 98 (2d Cir. 2006) 26

Del. Valley Floral Group, Inc. v. *Shaw Rose Nets, L.L.C.*, 2009 WL 5127941 (S.D. Fla. Nov. 6, 2009) 26

E. & J. Gallo Winery v. *Andina Licores S.A.*, 2007 WL 1589546 (E.D. Cal. June 1, 2007) 29

Echevarri v. *MacFarland*, 2005 WL 3440430 (D.N.J. Dec. 14, 2005) 17

Envtl. Def. v. *Duke Energy Corp.*, 549 U.S. 561 (2007) 46

Extra Equipamentos E Exportação Ltda. v. *Case Corp.*, 541 F.3d 719 (7th Cir. 2008) ....*passim*

F. Hoffmann-La Roche Ltd. v. *Empagran S.A.*, 542 U.S. 155 (2004) 33

FCC v. *AT&T Inc.*, 131 S. Ct. 1177 (2011) 45

Fairfax's Devisee v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) 49

Flores-Torres v. *Holder*, 2010 WL 1910011 (N.D. Cal. May 11, 2010) 26, 32

FMC Corp. v. *Holliday*, 498 U.S. 52 (1990) 24

Fort Stewart Sch. v. *FLRA*, 495 U.S. 641 (1990) 48

Gabriel Techs. Corp. v. *Qualcomm Inc.*, 2010 WL 3718848 (S.D. Cal. Sept. 20, 2010) 29

TABLE OF AUTHORITIES—continued

Page(s)

Gidding v. *Anderson*, 2008 WL 5068524 (N.D. Cal. Nov. 24, 2008) 26
Hamilton v. *Lanning*, 130 S. Ct. 2464 (2010) 12
Hernandez v. *New York*, 500 U.S. 352 (1991) 18
Hynix Semiconductor Inc. v. *Rambus Inc.*, 697 F. Supp. 2d 1139 (N.D. Cal. 2010)... 26, 27, 31
In re Puerto Rico Elec. Power Auth., 687 F.2d 501 (1st Cir. 1982) 11
Johnson v. *S. Pac. Co.*, 196 U.S. 1 (1904)..... 50
Johnson v. *United States*, 529 U.S. 694 (2000) 12
Kaiser Indus. Corp. v. *McLouth Steel Corp.*, 50 F.R.D. 5 (E.D. Mich. 1970)..... 30
Keeney v. *Tamayo-Reyes*, 504 U.S. 1 (1992) 18
LG Elecs. U.S.A., Inc. v. *Whirlpool Corp.*, 2011 WL 5008425 (N.D. Ill. Oct. 20, 2011) 31
Lockett v. *Hellenic Sea Transps., Ltd.*, 60 F.R.D. 469 (E.D. Pa. 1973)..... 30
Maker's Mark Distillery, Inc. v. *Diageo N. Am., Inc.*, 2010 WL 2651186 (W.D. Ky. June 30, 2010)..... 26, 28
Mallard v. *United States Dist. Ct.*, 490 U.S. 296 (1989)..... 14
Mendoza v. *Ring*, 2008 WL 2959848 (C.D. Ill. July 30, 2008)..... 17
Merck Sharp & Dohme Pharm., SRL v. *Teva Pharm. USA, Inc.*, 2010 WL 1381413 (D.N.J. Mar. 31, 2010) 26
Microsoft Corp. v. *i4i Ltd. P'ship*, 131 S. Ct. 2238 (2011)..... 48

TABLE OF AUTHORITIES—continued

Page(s)

Munaf v. *Geren*, 553 U.S. 674 (2008) 18
Muscarello v. *United States*, 524 U.S. 125 (1998) 14, 15
Neles-Jamesbury, Inc. v. *Fisher Controls Int'l, Inc.*, 140 F. Supp. 2d 104 (D. Mass. 2001) 27
Oetiker v. *Jurid Werke, GmbH*, 104 F.R.D. 389 (D.D.C. 1982) 28
Ortho-McNeil Pharm., Inc. v. *Mylan Labs. Inc.*, 2008 WL 7384877 (N.D. W. Va. Aug. 18, 2008), aff'd in part, vacated in part, 569 F.3d 1353 (Fed. Cir. 2009) 31, 34
Ortho-McNeil Pharm., Inc. v. *Mylan Labs. Inc.*, 569 F.3d 1353 (Fed. Cir. 2009) 25, 29
Osorio v. *Dole Food Co.*, 2010 WL 3212065 (S.D. Fla. July 7, 2010) 31
Pace Shipping Servs. Network SA v. *M/V Ocean D*, 2003 WL 1733544 (E.D. La. Mar. 28, 2003) 17
Palomo v. *Trustees of Columbia Univ.*, 2005 WL 1683586 (S.D.N.Y. July 20, 2005), aff'd, 170 F. App'x 194 (2d Cir. 2006) 17
Pan Am. Grain Mfg. Co. v. *Puerto Rico Ports Auth.*, 193 F.R.D. 26 (D.P.R. 2000), aff'd, 295 F.3d 108 (1st Cir. 2002) 27, 31
Permanent Mission of India to United Nations v. *City of New York*, 551 U.S. 193 (2007) 13
Porcelanas Florencia, S.A. v. *Caribbean Resort Suppliers, Inc.*, 2009 WL 1456338 (S.D. Fla. May 22, 2009) 26

TABLE OF AUTHORITIES—continued

Page(s)

Quy v. *Air Am., Inc.*, 667 F.2d 1059 (D.C. Cir. 1981) 11, 26
Raffold Process Corp. v. *Castanea Paper Co.*, 25 F. Supp. 593 (W.D. Pa. 1938)..... 30
Shared Med. Sys. v. *Ashford Presbyterian Cmty. Hosp.*, 212 F.R.D. 50 (D.P.R. 2002) 26
Slagenweit v. *Slagenweit*, 63 F.3d 719 (8th Cir. 1995) (per curiam)..... 11, 26
Smith v. *United States*, 508 U.S. 223 (1993)..... 14, 15
Société Nationale Industrielle Aérospatiale v. *United States Dist. Ct.*, 482 U.S. 522 (1987)..... 33
Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 37
Studiengesellschaft Kohle mbH v. *Eastman Kodak Co.*, 713 F.2d 128 (5th Cir. 1983)..... 11, 28
Sunrider Corp. v. *Bountiful Biotech. Corp.*, 2010 WL 4590766 (C.D. Cal. Oct. 8, 2010) 17
Tharo Sys., Inc. v. *Cab Produkttechnik*, 2005 WL 1123595 (N.D. Ohio May 10, 2005)..... 26, 27
Tilton v. *Capital Cities/ABC, Inc.*, 115 F.3d 1471 (10th Cir. 1997)..... 26
Trading Techs. Int'l, Inc. v. *eSpeed, Inc.* 750 F. Supp. 2d 962 (N.D. Ill. 2010)..... 29
United States v. *Chipres-Madriz*, 2010 WL 334372 (N.D. Cal. Jan. 28, 2010)..... 17
United States v. *Dominguez Benitez*, 542 U.S. 74 (2004)..... 18
United States v. *Prado-Cervantez*, 2011 WL 4691934 (D. Kan. Oct. 6, 2011)..... 17

TABLE OF AUTHORITIES—continued

Page(s)

United States v. *Tinkleberg*, 131 S. Ct. 2007 (2011) 23

V-Formation, Inc. v. *Benetton Grp. SPA*, 2003 WL 21403326 (S.D.N.Y. June 17, 2003) 26

Zayas v. *Puerto Rico*, 451 F. Supp. 2d 310 (D.P.R. 2006) 26

Statutes and Rules

Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040 (1978) 35

§ 2 ..... *passim*

§ 7 ..... *passim*

Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 6(a)(10), 96 Stat. 1248 (1982) 49

Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub L. No. 109-162, tit. II, § 201(14), 110 Stat. 2960 (2006) 49

8 U.S.C. § 1555 ..... 47, 48

10 U.S.C. § 828 47

10 U.S.C. § 948*l*(b) 47

20 U.S.C. § 6319(g)(2) 49

26 U.S.C. § 44(c)(2)(B) 47

28 U.S.C. § 530C(b)(1)(I) 47, 48

28 U.S.C. § 1827 (1976 & Supp. II 1978) 35, 37, 38

28 U.S.C. § 1827(a) (1976 & Supp. II 1978) 35

TABLE OF AUTHORITIES—continued

Page(s)

28 U.S.C. § 1827(b) (1976 & Supp. II 1978) 35
28 U.S.C. § 1827(b)(1) 47
28 U.S.C. § 1827(d) (1976 & Supp. II 1978) 35
28 U.S.C. § 1827(g) (1976 & Supp. II 1978) 36
28 U.S.C. § 1827(k) (1976 & Supp. II 1978) 36
28 U.S.C. § 1828 (1976 & Supp. II 1978)..... 35, 36, 37
28 U.S.C. § 1828(a) (1976 & Supp. II 1978) 36
28 U.S.C. § 1828(c) (1976 & Supp. II 1978)..... 36
28 U.S.C. § 1920 .....*passim*
28 U.S.C. § 1920(6).....*passim*
42 U.S.C. § 2991b-3(b)(2) 47, 48
42 U.S.C. § 12103(1)(A)..... 47
Fed. R. Civ. P. 43..... 45, 46
Fed. R. Civ. P. 43(d) 45
Fed. R. Civ. P. 54(d) 2, 3, 27, 31
Fed. R. Civ. P. 54(d)(1) 3
Fed. R. Evid. 604 ..... 45, 46
D.P.R. R. 5(g)..... 41
Cal. Gov't Code § 26806(a)..... 18
Fla. Stat. Ann. § 90.606 18
Mich. Comp. Laws Ann. § 775.19 18

TABLE OF AUTHORITIES—continued

Page(s)

Other Authorities

12,000 Words: A Supplement to Webster's Third New International Dictionary (1986)..... 13

1 Benjamin Vaughan Abbott, *Dictionary of Terms and Phrases Used in American or English Jurisprudence* (1879) 15

William C. Anderson, *A Dictionary of Law* (1889)..... 15

Jane Arraf, *How the Pentagon aims to prevent more Wikileaks releases*, CHRISTIAN SCI. MONITOR, Oct. 27, 2010..... 16

James A. Ballentine, *A Law Dictionary* (1916)..... 15

Ballentine's Law Dictionary (3d ed. 1969)..... 16

Black's Law Dictionary (4th ed. 1957)..... 15

Black's Law Dictionary (9th ed. 2009)..... 7, 12, 14

Hadumod Bussmann, *Routledge Dictionary of Language and Linguistics* (1996)..... 15

The Chambers Dictionary (10th ed. 2006)..... 15

P.H. Collin, *Dictionary of Law* (2d ed. 1999)..... 15

The Concise Oxford Dictionary of Current English (1917)..... 15

Cong. Globe App., 32d Cong., 2d Sess. 207 (1853)..... 24, 25

119 Cong. Rec. 14,449 (1977)..... 44

Court Interpreters Act: Hearing on H.R. 10228, H.R. 10129, and S. 1315 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 95th Cong. (1978)..... 42

TABLE OF AUTHORITIES—continued

Page(s)

Trenton Daniel, *Immigration agencies moving from iconic Miami headquarters*, MIAMI HERALD, Oct. 20, 2008 16

John Eligon, *In Court, Lost in Translation*, N.Y. TIMES, July 29, 2011 16

Fed. R. Evid. 604 advisory committee's note (1972) 45

French Penal Code Law No. 80-438 art. 1A 33

Jack P. Friedman, *Dictionary of Business Terms* (4th ed. 2007) 15

Funk & Wagnalls Comprehensive Standard Dictionary of the English Language (1921) 15

Roseann Dueñas González et al., *Fundamentals of Court Interpretation: Theory, Policy and Practice* (1991) 21, 22

H.R. 10228, 95th Cong. § 3 (1977) 42

H.R. Rep. No. 95-1687 (1978) 44

Interpreters in Courts of the United States; Announcement of Spanish/English Certification Examination, 46 Fed. Reg. 60,636 (Dec. 11, 1981) 39, 40

Interpreters in Courts of the United States; Announcement of Spanish/English Certification Examination, 48 Fed. Reg. 28,508 (June 22, 1983) 40

Interpreters in Courts of the United States; Announcement of Spanish/English Certification Examination, 50 Fed. Reg. 11,524 (Mar. 22, 1985) 40

TABLE OF AUTHORITIES—continued

Page(s)

Interpreters in Courts of the United States; Announcement of Spanish/English Certification Examination, 51 Fed. Reg. 44,496 (Dec. 10, 1986) 40

Interpreters in Courts of the United States; Announcement of Spanish/English Certification Examination, 53 Fed. Reg. 43,744 (Oct. 28, 1988) 40

Interpreters in Courts of the United States; Announcement of Spanish/English Certification Examination, 56 Fed. Reg. 5,794 (Feb. 13, 1991) 40

Interpreters in Courts of the United States; Announcement of Spanish/English Certification Examination, 58 Fed. Reg. 13,736 (Mar. 15, 1993) 40

Interpreters in Courts of the United States; Announcement of Written Segment of Certification Examination for Spanish, Cantonese, Mandarin, and Korean; and Written Segment of "Otherwise Qualified" Examination for Arabic, Hebrew, Italian, Mien, Polish, and Russian, 59 Fed. Reg. 30,333 (June 13, 1994) 40

Nina L. Ivanichvili, *Considerations in Selecting Interpreters and Translators*, 39 COLO. LAW. 39 (Sept. 2010) 16

Marianne Mason, *Courtroom Interpreting* (2008) 21

TABLE OF AUTHORITIES—continued

Page(s)

Merriam-Webster's Collegiate Dictionary (11th ed. 2003) 15

Holly Mikkelson, *Introduction to Court Interpreting* (2000) 21, 22

8 James W. Moore, *Moore's Federal Practice* (3d ed. 2011) 45

10 James W. Moore, *Moore's Federal Practice* (3d ed. 2011) 4

S. Rep. No. 95-569 (1977) 44

Brigid Schulte, *Communities Struggle to Break Down Language Barriers*, WASH. POST, Jan. 27, 2005 17

The Scribner-Bantam English Dictionary (1977) 15

Morry Sofer, *The Translator's Handbook* (7th ed. 2009) 21

Webster's II: New Riverside University Dictionary (1984) 15

Webster's Third New International Dictionary of the English Language Unabridged (1976) 6, 7, 12, 13, 14

9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed. 2008) 46

10 Charles A. Wright et al., *Federal Practice and Procedure* (3d ed. 1998) 3

27 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure* (2d ed. 2007) 45

BRIEF FOR RESPONDENT

Section 1920(6) of Title 28 of the United States Code authorizes a federal judge or clerk to tax as costs against a losing party the "compensation of interpreters." The question presented is whether "interpreters" in that provision include those who translate written as well as spoken words.

There can be little question that the word "interpreters" is broad enough to include those who translate written words, both according to the definition in authoritative dictionaries and as a matter of common usage. But "interpreters" can also be used in a narrower sense, to refer to members of a profession specializing in oral translation, as distinct from the "translator" profession, whose members specialize in written translation. The issue in this case is whether "interpreters" in 28 U.S.C. § 1920(6) has the broader meaning, as the court below and most other courts to consider the question have concluded, or the narrower one, as petitioner maintains. This Court should hold that it has the broader meaning.

There are good reasons to conclude that Congress intended the broader meaning in Section 1920(6). Translation serves the essential litigation function of ensuring that relevant foreign-language evidence is intelligible to the parties and the court. The provision at issue reflects a legislative determination that the cost of translation can be shifted to the losing party. It would be anomalous, in such a provision, to include the translation of testimony but not the translation of documents. For one thing, the two types of evidence are equally important. For another, there are a number of hybrid translating tasks in litigation that are neither strictly "oral" nor strictly

"written"—for example, the oral translation of documents and the written translation of recordings—and that can be performed by a member of either the "interpreter" or the "translator" profession.

Petitioner claims that there are good reasons why Congress would have intended the narrower meaning of "interpreter" in Section 1920(6), but the reasons he proffers are not in fact good. Far from being oppressively large, as petitioner suggests, cost awards for document translation are typically quite modest. And it cannot seriously be thought that such awards somehow interfere with the sovereign authority of foreign nations, as he also contends.

In addition to offering these justifications for a narrower reading of Section 1920(6), petitioner relies on other statutes and rules that use the term "interpreter." But it is hardly clear that the term has the narrower meaning in those provisions. And even if it does in some of them, that is only because of the context, which is very different from that of Section 1920(6).

The judgment of the court of appeals should be affirmed.

STATEMENT

1. "Section 1920 [of Title 28 of the United States Code] enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d) [of the Federal Rules of Civil Procedure]." *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 441-442 (1987). Rule 54(d) provides, in relevant part, that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the

prevailing party." Fed. R. Civ. P. 54(d)(1). Section 1920 provides, in full, as follows:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

Section 1920 "is phrased permissively because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party." *Crawford Fitting*, 482 U.S. at 442. In light of the "discretionary character" of the rule, federal courts "are free to pursue a case-by-case approach and to make their decisions on the basis of the circumstances and equities of each case." 10 Charles A.

Wright et al., *Federal Practice and Procedure* § 2668, at 231 (3d ed. 1998). Costs may be "denied or limited," for example, if they "were unreasonably incurred or unnecessary to the case." 10 James W. Moore, *Moore's Federal Practice* § 54.101[1][b], at 54-158 (3d ed. 2011).

2. Petitioner Kouichi Taniguchi was for a time a professional baseball player in Japan. On November 6, 2006, he took a tour of the premises of respondent Kan Pacific Saipan, Ltd. (Kan Pacific), the Mariana Resort and Spa in Saipan. During the tour, a piece of wooden deck broke beneath him and his leg fell through a hole. Pet. App. 2a, 13a.

On February 11, 2008, Taniguchi filed a negligence action against Kan Pacific in the United States District Court for the District of the Northern Mariana Islands. He alleged that he sustained injuries from the fall and that, as a result of the injuries, he incurred medical expenses and could not honor certain contractual obligations. JA 32-35; Pet. App. 2a, 13a.

The district court granted summary judgment to Kan Pacific, on the ground that Taniguchi could not prove that Kan Pacific failed to exercise reasonable care. Pet. App. 12a-17a. The court subsequently awarded Kan Pacific a total of $7,732.20 in costs: $2,215 for transcripts of two depositions of Taniguchi; and $5,517.20 for interpreter services, which included the costs of translating contracts, medical records, and other documents from Japanese to English. *Id.* at 19a-22a; see JA 58-61, 79-86, 103. In overruling Taniguchi's objections to the award, the district court concluded that the costs of translating documents are allowable under 28 U.S.C. § 1920(6), which authorizes a district court to tax, among other

costs, "compensation of interpreters," and found that the costs should be awarded in this case because "the defense required documents translated" "[i]n order to depose Plaintiff." Pet. App. 24a-25a.[1]

3. The Ninth Circuit affirmed both the district court's grant of summary judgment, Pet. App. 9a-11a, and its award of costs, *id.* at 1a-8a. As relevant here, the court of appeals rejected Taniguchi's contention that "the district court erred in awarding costs for translation services used by Kan Pacific during the litigation." *Id.* at 4a.

As the Ninth Circuit observed, the Sixth Circuit has held that "awarding costs for translation of documents necessary for litigation is appropriate." Pet. App. 6a. It relied in so holding "on a dictionary definition of interpret, which included 'to translate into intelligible or familiar language.'" *Ibid.* (quoting *BDT Prods., Inc.* v. *Lexmark Int'l, Inc.*, 405 F.3d 415,

---

[1] Through translation of the documents and the deposition of Taniguchi, Kan Pacific had discovered that the contracts were signed after the accident and backdated to dates before the accident; that Taniguchi's injuries did not prevent him from fulfilling his contractual obligations; and that Taniguchi did not expect to be paid under the contracts, which had a total value of $1.2 million. Resp. C.A. Br. 5-7; see Resp. C.A. Supp. E.R. 10, 13, 32-38, 40-71, 74-76. After obtaining this information, Kan Pacific filed a motion seeking (1) dismissal of the action on the ground that Taniguchi had fabricated evidence; (2) summary judgment as to that portion of Taniguchi's claim for lost wages that was based on the contracts; or, in the alternative, (3) an order precluding Taniguchi from offering the contracts or evidence of them at trial. See JA 20-21. In support of the motion, Kan Pacific submitted translations of the contracts. See *ibid.* (Exhs. C-E). Having granted summary judgment to Kan Pacific in its entirety, the district court found it unnecessary to rule on this motion. Pet. App. 17a n.2.

419 (6th Cir. 2005)). The Ninth Circuit agreed with that decision. "In § 1920(6)," the court explained, "the word 'interpreter' can reasonably encompass a 'translator,' both according to the dictionary definition and common usage of these terms, which does not always draw precise distinctions between foreign language interpretations involving live speech versus written documents." *Id.* at 7a. The court thus held that, "within the meaning of § 1920(6), the prevailing party should be awarded costs for services required to interpret either live speech or written documents into a familiar language, so long as interpretation of the items is necessary to the litigation." *Ibid.*

The court of appeals then determined that that standard was satisfied here. "As Taniguchi alleged that his injuries caused him to lose compensation from his negotiated contract deals," the court explained, "it was necessary for Kan Pacific to have Taniguchi's documents and medical records translated to adequately prepare its defense." Pet. App. 7a-8a. And because the court of appeals "conclude[d] that § 1920(6) contemplates the award of costs for translation services," it "h[e]ld that the district court acted within its discretion when it determined that translation services were necessary to render pertinent documents intelligible to the litigants." *Id.* at 8a.

SUMMARY OF ARGUMENT

The term "interpreters" in 28 U.S.C. § 1920(6) encompasses those who translate written as well as spoken words.

A. The ordinary meaning of "interpreters" includes those who translate written words. *Webster's*

Third New International Dictionary and *Black's Law Dictionary* both define "interpreter" as a person who translates from one language to another. These dictionaries indicate that an "interpreter" is "especially" a person who translates *orally*, but that only serves to confirm that the definition is not *limited* to oral translators. Taniguchi cites a number of dictionaries that have a narrower definition, but almost all of them are abridged versions of *Webster's*, are long out of date, are obscure, or contain a definition of "interpreter" that is narrower even than the one that Taniguchi advocates.

The term "interpreters" also includes those who translate written words as a matter of common usage. For example, district judges from around the country, who have more experience than most with the translation of spoken and written language in litigation, routinely refer to those who translate written language as "interpreters." And while Taniguchi insists that there is a clear distinction between "interpreters" (who work with speech) and "translators" (who work with writing), this Court itself has used "translator" and "interpreter" interchangeably, sometimes referring to those who translate spoken language as "translators."

B. There are good reasons to conclude that Congress used "interpreters" in its broader sense in Section 1920(6). Documentary evidence is no less important than testimonial evidence, and translating either serves the identical purpose of making relevant foreign-language material comprehensible to the parties and the court. If, as all agree, Congress intended that the cost of translating testimonial evidence could be borne by the losing party, it would be

anomalous for Congress to have had the opposite intention for documentary evidence.

That is particularly true because a number of basic translating tasks in litigation are neither entirely "oral" nor entirely "written," and can be performed by a member of either the "interpreter" or the "translator" profession. Tasks that defy Taniguchi's strict dichotomy include (1) sight translation (the oral translation of a written document); (2) transcription and translation of recorded conversations (the written translation of oral speech); (3) document comparison; and (4) document translation. Understanding an "interpreter" in Section 1920(6) to be someone who translates either spoken *or* written words obviates the need for courts to draw arbitrary distinctions between "interpretation" and "translation," and provides a simple, easily administrable rule.

C. While there are good reasons for Congress to have included those who translate written words in Section 1920(6), there are no good reasons for it to have excluded them. Taniguchi contends that allowing taxation of document-translation costs will routinely lead to very large cost awards, but he provides no evidence of that. On the contrary, in the overwhelming majority of representative cases that he cites, the awards for document-translation costs were less than $13,000. Appropriate restrictions on such awards are found, not in a categorical ban, but in the discretion given district courts to deny or limit awards of costs that are unnecessary, unreasonable, or otherwise unwarranted. District courts have been exercising that discretion for decades, without any evident difficulty, in cases involving all manner of costs—including the costs of both written and oral translation.

Taniguchi also claims that allowing taxation of document-translation costs will interfere with the sovereign authority of foreign nations, by subjecting their citizens not only to document discovery but also to the costs of translating the documents they produce. But the possibility of typically modest cost awards in cases in which (1) the prevailing party had a need to translate documents, (2) the losing party is a foreign national, and (3) the district court exercises its discretion to tax some or all of the translating costs cannot reasonably be thought to rise to the level of interference with foreign nations' sovereign authority. In any event, the reading of Section 1920(6) that we advocate frequently operates to the *benefit* of foreign parties, as when they have their own documents translated into English for submission to the court and prevail in the action.

D. Contrary to Taniguchi's assertion, the Court Interpreters Act does not reflect a congressional intent to exclude the translation of written words from Section 1920(6). Taniguchi relies on Section 2 of the Act, which requires the use of certified "interpreters in courts of the United States" in actions initiated by the United States, at government expense, when necessary to enable a party or witness to comprehend the proceedings. He maintains that Section 2 is limited to oral, in-court interpretation and that Section 7 of the Act, which added the cost provision at issue here, must be similarly limited. That is wrong in two respects.

First, even assuming that Section 2 is limited in the way that Taniguchi claims, there is no reason to believe that Section 7 carries the same meaning. Unlike Section 7, Section 2 uses narrow language; was placed in a chapter of Title 28 that addresses the

subject of "Witnesses"; and mandates interpretation services that are funded by taxpayers. *Second*, it is hardly clear that the duties of interpreters under Section 2 are in fact limited to oral, in-court interpretation. Three years after passage of the Court Interpreters Act, and for thirteen years after that, the Director of the Administrative Office of the United States Courts, who is charged with administering Section 2, regularly published notices in the *Federal Register* that described the duties of interpreters under the Act. Each notice stated that those duties included, not only oral translation, but also translation of documents.

E. There is no other persuasive evidence that Congress intended to exclude the translation of written words from Section 1920(6). Taniguchi claims that the term "interpreter" is limited to oral translation whenever it is used in federal rules and other provisions of the United States Code. But it is far from obvious that the term has the narrower meaning everywhere else; and even where it does, that reading is appropriate only because of the context of the particular rule or statutory provision. Taniguchi also relies on the canon favoring narrow construction of statutes in derogation of the common law. But the common-law prohibition on recovery of costs was unambiguously repealed by statute more than 150 years ago, and the scope of a particular provision of the cost statute is not subject to this interpretive canon.

ARGUMENT

THE TERM "INTERPRETERS" IN 28 U.S.C. § 1920(6) ENCOMPASSES THOSE WHO TRANSLATE WRITTEN AS WELL AS SPOKEN WORDS

All but one of the courts of appeals to consider the question have concluded that the costs of translating documents are taxable under 28 U.S.C. § 1920(6).[2] Those decisions are correct. The ordinary meaning of "interpreters" includes those who translate written words. There are good reasons to include them in Section 1920(6). And there are no good reasons to exclude them. Contrary to Taniguchi's assertion, the Court Interpreters Act does not suggest that document translation is excluded from

---

[2] See Pet. App. 7a (Ninth Circuit's decision below) ("within the meaning of § 1920(6), the prevailing party should be awarded costs for services required to interpret either live speech or written documents into a familiar language"); *BDT Prods., Inc.* v. *Lexmark Int'l, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005) ("translation costs are taxable under § 1920"); see also *Slagenweit* v. *Slagenweit*, 63 F.3d 719, 721 (8th Cir. 1995) (per curiam) (affirming award of "costs for * * * translated documents" under "28 U.S.C. § 1920(6)"); *Chore-Time Equip., Inc.* v. *Cumberland Corp.*, 713 F.2d 774, 782 (Fed. Cir. 1983) ("The award of costs for translation * * * was appropriate under 28 U.S.C. § 1920(6)."); *Studiengesellschaft Kohle mbH* v. *Eastman Kodak Co.*, 713 F.2d 128, 133 (5th Cir. 1983) ("translation expenses [are] a taxable cost * * * under * * * section 1920"); *In re Puerto Rico Elec. Power Auth.*, 687 F.2d 501, 510 (1st Cir. 1982) ("Whichever party ultimately prevails will * * * be free to apply to district court for reimbursement of its translation expenses as 'costs' under * * * 28 U.S.C. § 1920."); *Quy* v. *Air Am., Inc.*, 667 F.2d 1059, 1065 (D.C. Cir. 1981) ("Under [Section 1920(6)], the District Court was authorized to award costs for * * * translations * * *."). But see *Extra Equipamentos E Exportação Ltda.* v. *Case Corp.*, 541 F.3d 719, 727-728 (7th Cir. 2008).

Section 1920(6). Nor is there any other persuasive evidence that it is.

A. The Ordinary Meaning Of "Interpreters" Includes Those Who Translate Written Words

Section 1920(6) provides that a judge or clerk of a federal court may tax as costs the "compensation of interpreters." The term "interpreters" is not defined in the statute. "When terms used in a statute are undefined, [this Court] give[s] them their ordinary meaning." *Hamilton* v. *Lanning*, 130 S. Ct. 2464, 2471 (2010) (internal quotation marks omitted). As the court of appeals correctly concluded, the ordinary meaning of "interpreters" includes those who translate written words, both according to "the dictionary definition" and as a matter of "common usage." Pet. App. 7a.

1. *Webster's Third New International Dictionary* defines "interpreter" as "one that translates," and "translate" as "to turn into one's own or another language." *Webster's Third New International Dictionary of the English Language Unabridged* 1182, 2429 (1976) (*Webster's Third*). The ordinary meaning of "interpreters" thus does not exclude "document translators," as Taniguchi maintains. Pet. Br. 12.

On the contrary, the relevant definition in that dictionary, which is one of "the most authoritative dictionaries" of American English, *Johnson* v. *United States*, 529 U.S. 694, 706 n.9 (2000), reads, in full, as follows: "one that translates; *esp* : a person who translates orally for parties conversing in different tongues." *Webster's Third* 1182. The definition of "interpreter" in the leading law dictionary is essentially the same: "[a] person who translates, esp. oral-

ly, from one language to another." *Black's Law Dictionary* 895 (9th ed. 2009). Taniguchi's submission that an "interpreter" is *only* a person who translates orally is inconsistent with these definitions. "Especially" does not mean "only," and the ordinary meaning of "interpreter" thus includes both spoken and written words.

The only appellate court to have concluded otherwise—the Seventh Circuit—acknowledged that the word "especially" in the definition "leaves open the possibility that an interpretation can sometimes be of a document." *Extra Equipamentos E Exportação Ltda.* v. *Case Corp.*, 541 F.3d 719, 728 (7th Cir. 2008). But it thought that possibility was accounted for by the circumstance in which "a judge interprets statutes." *Ibid.* This reasoning is misguided, because a judge who interprets a statute is not "one that translates" at all. *Webster's Third* 1182. The act of statutory interpretation is covered by a separate (indeed, the first) definition of "interpreter": "one that interprets, explains, or expounds." *Ibid.* Under the definition relevant here, an "interpreter" is a person who *translates* spoken or written words.

For his part, Taniguchi takes the position that all that matters in the definition is what comes after "*esp.*" He relies on the dictionary's statement that "[t]he sense divider *esp* (for especially) is used to introduce the most common meaning subsumed in the more general preceding definition." Pet. Br. 15 n.5 (quoting *12,000 Words: A Supplement to Webster's Third New International Dictionary* 15a (1986)). But Taniguchi offers no reason why a "general definition" in authoritative dictionaries should be ignored. It obviously should not. See, *e.g.*, *Permanent Mission of India to United Nations* v. *City of New York*, 551 U.S.

193, 198 (2007) (relying upon "general definitions" in *Black's Law Dictionary* in interpreting statutory language). And the general definition in this case is that an "interpreter" is someone who translates.

In *Smith* v. *United States*, 508 U.S. 223 (1993), this Court held that the statutory term "uses a firearm" is not limited to using a firearm as a weapon, and includes the exchange of a gun for narcotics. In explaining why, the Court said:

> It is one thing to say that the ordinary meaning of "uses a firearm" *includes* using a firearm as a weapon, since that is * * * the example of "use" that most immediately comes to mind. But it is quite another to conclude that, as a result, the phrase also *excludes* any other use. * * * As the dictionary definitions * * * make clear, one can use a firearm in a number of ways.

Id. at 230. The same, *mutatis mutandis*, is true here.

Taniguchi cites *Mallard* v. *United States District Court*, 490 U.S. 296 (1989), for the proposition that "the 'most common meaning' of a statutory term ordinarily controls." Pet. Br. 15 n.5 (quoting 490 U.S. at 301). But there was no indication in *Mallard* that the "most common meaning" of the term in question (there, the word "request") was any narrower than the "general definition." Taniguchi also cites *Muscarello* v. *United States*, 524 U.S. 125 (1998), for the proposition that a statutory term should be construed "in keeping with its 'primary meaning.'" Pet. Br. 15 n.5 (quoting 524 U.S. at 128). But that case does not help him either. For one thing, the "primary meaning" of "interpreter"—"one that interprets, explains, or expounds," *Webster's Third* 1182—has no

applicability here. For another, *Muscarello*, like *Smith*, *rejected* the "narrow interpretation" of the statutory term at issue (there, the phrase "carries a firearm"). *Muscarello*, 524 U.S. at 138.

Taniguchi also cites a number of dictionaries that include only the narrower definition of "interpreter." Pet. Br. 16. But almost all of those dictionaries (a) are abridged versions of *Webster's* (with concomitantly abridged definitions);[3] (b) are long out of date (and were long out of date when Section 1920(6) was enacted);[4] (c) are obscure (and therefore not authoritative);[5] or (d) contain a definition of "interpreter" that is narrower even than the one that Taniguchi advocates (and so cannot control here).[6] Tanigu-

---

[3] See *Webster's II: New Riverside University Dictionary* 638 (1984); *Merriam-Webster's Collegiate Dictionary* 654 (11th ed. 2003).

[4] See 1 Benjamin Vaughan Abbott, *Dictionary of Terms and Phrases Used in American or English Jurisprudence* 639 (1879); William C. Anderson, *A Dictionary of Law* 565 (1889); James A. Ballentine, *A Law Dictionary* 247 (1916); *The Concise Oxford Dictionary of Current English* 429 (1917); *Funk & Wagnalls Comprehensive Standard Dictionary of the English Language* 323 (1921).

[5] See *The Scribner-Bantam English Dictionary* 476 (1977); Hadumod Bussmann, *Routledge Dictionary of Language and Linguistics* 237 (1996); P.H. Collin, *Dictionary of Law* 127 (2d ed. 1999); *The Chambers Dictionary* 779 (10th ed. 2006); Jack P. Friedman, *Dictionary of Business Terms* 343 (4th ed. 2007).

[6] The fourth edition of *Black's Law Dictionary*, see Pet. Br. 15, defines "interpreter" as "a person sworn *at a trial* to interpret the evidence of a foreigner or a deaf and dumb person to the court." *Black's Law Dictionary* 954 (4th ed. 1957) (emphasis added). But no one—including Taniguchi—would say that Section 1920(6) precludes recovery of the cost of oral interpretation at a pre- or post-trial hearing; at a deposition; or, for that matter, at a witness interview or witness-preparation session. See,

chi's reliance on out-of-date dictionaries is especially problematic, because a later edition of one of them defines "interpreter" to *include* the translation of written words. See *Ballentine's Law Dictionary* 654-655 (3d ed. 1969) ("interpreter" means "[o]ne who interprets, particularly one who interprets words *written or spoken* in a foreign language," and "interpret" means "to translate from a foreign language" (emphasis added)).

2. The term "interpreters" also includes those who translate written words as a matter of common usage. Taniguchi insists that "common usage * * * recognize[s] that 'interpreters' work in the context of spoken language," while "translators" work in the context of written language. Pet. Br. 42. But as one of the very authorities on which he relies, *id.* at 19, points out, "case law, courts, and the general public tend to use the terms 'translator' and 'interpreter' interchangeably." Nina L. Ivanichvili, *Considerations in Selecting Interpreters and Translators*, 39 COLO. LAW. 39, 40 (Sept. 2010).

Newspaper articles, for example, commonly refer to those who translate documents as "interpreters."[7]

---

e.g., Pet. Br. 38 (interpreters covered by Section 1920(6) translate for "witnesses (including deponents)" (quoting *Extra Equipamentos*, 541 F.3d at 728)); see also *id.* at 7; NAJIT Br. 18.

[7] See, *e.g.*, John Eligon, *In Court, Lost in Translation*, N.Y. TIMES, July 29, 2011 ("Disputes over how interpreters translate testimony or documents come up regularly in court cases."); Jane Arraf, *How the Pentagon aims to prevent more Wikileaks releases*, CHRISTIAN SCI. MONITOR, Oct. 27, 2010 ("Mr. Zaer, editor of Sabah al-Jadeed, says he has hired a team of six interpreters working on translating the documents into Arabic."); Trenton Daniel, *Immigration agencies moving from iconic Miami headquarters*, MIAMI HERALD, Oct. 20, 2008 ("Interpreters translate Spanish, Haitian Creole and Portugese documents in-

So do opinions of district judges from around the country, who have more experience than most with the translation of spoken and written language in the course of litigation.[8] Indeed, this Court itself has used "translator" and "interpreter" interchangeably, sometimes referring to those who translate oral

---

to English."); Brigid Schulte, *Communities Struggle to Break Down Language Barriers*, WASH. POST, Jan. 27, 2005 ("Alexandria has just come up with a list of certified local interpreters who are qualified to translate documents.").

[8] See, *e.g.*, *United States* v. *Prado-Cervantez*, 2011 WL 4691934, at *3 (D. Kan. Oct. 6, 2011) ("Standby counsel should also be prepared to arrange for interpreters to interpret or translate documents when necessary for defendant."); *Sunrider Corp.* v. *Bountiful Biotech. Corp.*, 2010 WL 4590766, at *13 (C.D. Cal. Oct. 8, 2010) ("Wilks also states that he did not fully understand the import * * * of the Chinese language documents * * * and retained a certified interpreter to prepare formal translations * * *."); *United States* v. *Chipres-Madriz*, 2010 WL 334372, at *1 n.2 (N.D. Cal. Jan. 28, 2010) (immigration judge informed alien that he had a right to "have [certain] documents translated by an interpreter"); *Mendoza* v. *Ring*, 2008 WL 2959848, at *2 (C.D. Ill. July 30, 2008) ("The clerk of court shall forward the documents needed for translation to the interpreter."); *Echevarri* v. *MacFarland*, 2005 WL 3440430, at *3 (D.N.J. Dec. 14, 2005) (counsel allegedly ineffective because of "fail[ure] to ensure that Petitioner had the services of a Spanish interpreter to translate discovery documents"); *Palomo* v. *Trustees of Columbia Univ.*, 2005 WL 1683586, at *3 (S.D.N.Y. July 20, 2005) ("she was asked to find an interpreter to translate a document"), aff'd, 170 F. App'x 194 (2d Cir. 2006); *Pace Shipping Servs. Network SA* v. *M/V Ocean D*, 2003 WL 1733544, at *3 (E.D. La. Mar. 28, 2003) ("Defendants also attach a sworn affidavit of Rania Fustok, a local interpreter, who has translated the documents * * *."); *Borja* v. *Dole Food Co.*, 2002 WL 31757780, at *6 (N.D. Tex. Nov. 29, 2002) (considering, in ruling on motion to dismiss on forum non conveniens grounds, "the cost of interpreters to translate witness testimony and documentary evidence"), vacated, 2003 WL 21529297 (N.D. Tex. June 30, 2003).

speech as "translators."[9] And there are state statutes that use "interpreter" to mean a translator of spoken *or* written words.[10]

Taniguchi quotes the Seventh Circuit's statement that "Robert Fagles made famous translations into English of the *Iliad*, the *Odyssey*, and the *Aeneid*, but no one would refer to him as an English-language 'interpreter' of these works." Pet. Br. 16 (quoting *Extra Equipamentos*, 541 F.3d at 727). That may well be, but it could just as well be said that no one would refer to someone who *orally* trans-

---

[9] See, e.g., *Munaf* v. *Geren*, 553 U.S. 674, 683 (2008) ("Munaf * * * traveled to Iraq with several Romanian journalists. He was to serve as the journalists' translator and guide."); *United States* v. *Dominguez Benitez*, 542 U.S. 74, 77 n.1 (2004) ("A certified translator was present for the hearings in court * * *."); *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1, 3 (1992) (defendant, who "was provided with a defense attorney and interpreter," alleged that "his translator had not translated accurately and completely for him"); *Hernandez* v. *New York*, 500 U.S. 352, 361 (1991) (plurality op.) (referring to "the translator's rendition of Spanish-language testimony").

[10] See, *e.g.*, Cal. Gov't Code § 26806(a) ("the clerk of the court may employ as many foreign language interpreters as may be necessary to interpret in criminal cases * * * and to translate documents intended for filing in any civil or criminal action"); Fla. Stat. Ann. § 90.606 ("An interpreter shall take an oath that he or she will make a true interpretation of the questions asked and the answers given and that the interpreter will make a true translation into English of any writing which he or she is required * * * to * * * translate."); Mich. Comp. Laws Ann. § 775.19 ("if a person attends a court as an interpreter for the purpose of interpreting the testimony of a witness given in behalf of the prosecution, or for the purpose of translating or interpreting a writing or document introduced or used in a court in behalf of the prosecution, * * * the person shall receive compensation as ordered by the court").

lates into English the speeches of foreign leaders as they are being made as "an English-language 'interpreter' of the speeches." There is no question, however, that that person is in fact an "interpreter." The usage problem in the Seventh Circuit's example is not that the person is not an "interpreter"; it is that the word "interpreter," in the context of "interpreter of works," is generally understood to mean an "expounder" rather than a "translator" of the works.

The same can be said of the Seventh Circuit's statement, which Taniguchi also quotes, that, "[i]f a judge translated the French Code of Criminal Procedure into English, we would not say that he had 'interpreted' the French code into English." Pet. Br. 9 (quoting *Extra Equipamentos*, 541 F.3d at 728). While that is true, it is equally true that we would not say that an *oral* interpreter of a foreign-language speech had "interpreted" the speech into English. We would say that she had "translated" it into English. And yet that person would indisputably be an "interpreter" as the term is used in Section 1920(6).

B. There Are Good Reasons For Including Those Who Translate Written Words In Section 1920(6)

If, as we have shown, the ordinary meaning of "interpreters" includes those who translate written words, then that is how Section 1920(6) should be read, unless there is some basis to conclude that Congress intended a narrower meaning. There is none. On the contrary, insofar as taxation of costs is concerned, there are good reasons to treat the translation of writing the same as the translation of speech.

First, documentary evidence is no less important than testimonial evidence. In many cases—contract actions, for example—it can be more important. Translating either type of evidence serves the fundamental litigation purpose of making relevant foreign-language material comprehensible to the parties and the court. As the court of appeals correctly concluded, there is no less need, and sometimes more need, to "render pertinent documents intelligible to the litigants" and the court than to render pertinent testimony intelligible to them. Pet. App. 8a. If Congress intended that the losing party could be required to pay the costs of ensuring that *spoken* words are understood by the parties and the court, as it indisputably did, it would be anomalous for Congress to have intended that the losing party could not also be required to pay the costs of ensuring that *written* words are understood by them.

Second, translators of writing and translators of speech should be treated identically in the cost statute because there is considerable overlap between the two. Taniguchi contends that "[t]he professional literature addressing the subject of judicial interpreting draws a distinction between the vocal and written modes, applying the term 'interpreter' to the former" and the term "translator" to the latter. Pet. Br. 17. An "interpreter," according to Taniguchi, "listen[s] to something in one language * * * and orally translat[es] it into another language," whereas a "translator" "replace[s] * * * a written text from one language * * * into an equivalent written text in another language." *Id.* at 23-24 (internal quotation marks omitted). But while a "technical" meaning of "interpreter," *id.* at 17, may be a member of a "profession" that is "distinct" from the "translator" profession, Interpreting & Translation Professors Br. 1,

there are several basic translation tasks in litigation that are neither strictly "vocal" nor strictly "written," and/or that generally can be performed by a member of either the "interpreter" or the "translator" profession.

The very "professional literature" on which Taniguchi relies, Pet. Br. 17, recognizes as much. Thus:

- One such task is "sight translation," the "oral translation of a written document," Roseann Dueñas González et al., *Fundamentals of Court Interpretation: Theory, Policy and Practice* 401 (1991), which is "a hybrid of translation and interpretation," *ibid.*, that "combines both interpreting and translation tasks," Marianne Mason, *Courtroom Interpreting* 6 (2008), and is also known as "sight interpreting," *ibid.*
- Another task in which either "[t]ranslators or interpreters" can "specialize," *Fundamentals of Court Interpretation*, *supra*, at 440, is "the transcription and translation of recorded conversations," Holly Mikkelson, *Introduction to Court Interpreting* 78 (2000), a form of written translation of oral speech, which entails listening to a recording of oral communication in a foreign language, transcribing it in that language, and then preparing a written English translation of the transcription.
- A third such task is "document comparison," which requires "[a]n interpreter or a translator * * * to compare documents in the source and target languages in order to verify that the two versions are fully identical." Morry

Sofer, *The Translator's Handbook* 128 (7th ed. 2009).

- Last but certainly not least, a "task that court interpreters are frequently asked to perform is the translation of written documents"—that is, the preparation of written translations that "may be used as evidence." *Fundamentals of Court Interpretation*, *supra*, at 445. While "translation is considered an ancillary task * * * of the court interpreter," *ibid.*, and while "it is important for interpreters to candidly assess their translation ability and to turn down translation assignments if they feel they cannot perform the task adequately," *Introduction to Court Interpreting*, *supra*, at 77, "translation * * * of legal documents" is still "one of the many tasks of the court interpreter," *Fundamentals of Court Interpretation*, *supra*, at 34.

The prevalence of these basic translating tasks undermines Taniguchi's position. It would be difficult if not impossible to characterize at least the first three of them—which entail the spoken translation of written words or the written translation of spoken words—as either "interpretation" or "translation" under Taniguchi's strict dichotomy. Each task has elements of both, and can be performed by either an "interpreter" or a "translator." It would be absurd, moreover, to think that the recoverability of costs for any of these activities could depend, not on how they are characterized, but on the happenstance of whether the person who did the translating was considered a member of the "interpreter" or the "translator" profession. If that were the criterion, parties would simply hire a self-identified "interpreter" to

perform such tasks—including the translation of documents—to ensure that the costs would be recoverable in the event that they won. That might benefit members of the "interpreter" profession, but it would not benefit the parties or the court.

Taniguchi appears to take the position that "sight translation" is a form of "interpretation" that is covered by the statute, whether or not it is performed by an "interpreter" or a "translator." See Pet. Br. 19-20; see also Interpreting & Translation Professors Br. 14. But he cannot explain how the oral translation of *written* language satisfies his own (and his *amicus*'s) definition of "interpretation": "the process by which *oral* communication is rendered from one language to another." *Id.* at 20 (quoting NAJIT website). More fundamentally, Taniguchi cannot explain why, under his reading of Section 1920(6), the costs of translation in this case would have been recoverable if, to prepare for Taniguchi's deposition, Kan Pacific had had the contracts and medical records translated *orally* rather than in writing. Congress could not have intended to draw such an arbitrary and irrational distinction.

Understanding an "interpreter" in Section 1920(6) to be someone who translates either spoken *or* written words avoids these complications; obviates the need for courts to draw metaphysical distinctions between "interpretation" and "translation" in particular cases; and provides a simple, easily administrable rule. As long as the statutory language permits it—and the language of Section 1920(6) certainly does—Congress should be presumed to have intended that result. Cf. *United States* v. *Tinkleberg*, 131 S. Ct. 2007, 2014 (2011) (rejecting "interpretation [that] would make the [statute] significantly

more difficult to administer"); *FMC Corp.* v. *Holliday*, 498 U.S. 52, 64-65 (1990) (rejecting "restricted reading" of statute that would be "fraught with administrative difficulties").

C. There Are No Good Reasons For Excluding Those Who Translate Written Words From Section 1920(6)

Taniguchi concedes that "the translation of documents," like the translation of speech, "can play an important role in litigation." Pet. Br. 37. And he acknowledges the existence of tasks that are neither strictly "interpretation" nor strictly "translation." See *id.* at 19-20. He nevertheless contends that "there are significant differences" between the two that "warrant differential treatment with respect to the taxation of costs." *Id.* at 37. In particular, Taniguchi claims that allowing the costs of document translation to be taxed would "create the risk of large costs awards," *ibid.*, and "interfere[] with the sovereign authority of other nations," *id.* at 41 (internal quotation marks omitted). Far from being "significant," these supposed "differences" between oral and written translation are illusory.

1. a. Quoting a statement from the legislative history of the 1853 cost statute, Taniguchi contends that one of the "concerns" that led to the statute's enactment was Congress' determination that cost awards had "swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they [we]re taxed." Pet. Br. 3 (quoting *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 251 n.24 (1975), in turn quoting Cong. Globe App., 32d Cong., 2d Sess. 207 (1853) (remarks of Sen. Bradbury); brackets added by petitioner). But the

statement of the legislator that Taniguchi quotes addressed *attorneys' fees*, not costs.[11] This Court's summary of that statement is to the same effect. See *Alyeska Pipeline*, 421 U.S. at 251 ("In support of the proposed legislation, it was asserted * * * that losing litigants were being unfairly saddled with exorbitant *fees for the victor's attorneys*." (emphasis added)).

Unlike awards of attorneys' fees, awards for the cost of translating documents have rarely been "oppressive" or "disproportionate." Pet. Br. 3 (internal quotation marks omitted). Taniguchi's assertion that allowing recovery of document-translation costs creates "[t]he potential for large and chilling costs liability" and imposes "chilling costs burdens," *id.* at 39, is thus baseless. Indeed, the very cases that are cited in Taniguchi's petition-stage briefs demonstrate the opposite.

In his merits brief, Taniguchi cites a Federal Circuit decision, *Ortho-McNeil Pharmaceutical, Inc.* v. *Mylan Laboratories Inc.*, 569 F.3d 1353 (Fed. Cir. 2009), that affirmed an award of more than $1 million for the cost of translating documents. Pet. Br. 39. But that decision is an extreme outlier. Of the cases cited in Taniguchi's petition-stage briefs, including the "representative sample" of "district court cases since 2000," Pet. 12 n.4, there are by our count

---

[11] See Cong. Globe App., 32d Cong., 2d Sess. 207 ("The abuses that have grown up in the taxation of *attorneys' fees* which the losing party has been compelled to pay in civil suits, have been a matter of serious complaint. The papers before the committee show that in some cases *those costs* have been swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they are taxed, or the labor bestowed." (emphasis added)).

27 in which the court granted an award for the cost of translating documents and the amount of the award is identified in the decision. Only one award in those cases exceeded $76,000, and nearly all of them were far less. Twenty-three of the awards were less than $13,000; sixteen were less than $3,000; and eight were less than $1,000.[12]

---

[12] See *Tilton* v. *Capital Cities/ABC, Inc.*, 115 F.3d 1471, 1479 (10th Cir. 1997) ($1,675); *Slagenweit*, 63 F.3d at 720 (portion of $1,496.56); *Chore-Time Equip.*, 713 F.2d at 776 (portion of $2,932.32); *Quy*, 667 F.2d at 1065 ($412.50); *Castillo* v. *Teledyine Cont'l Motors, Inc.*, 2011 WL 1343051, at *5 (S.D. Fla. Mar. 16, 2011) ($10,884.93); *Chacon* v. *El Milagro Care Ctr., Inc.*, 2010 WL 3023833, at *8 (S.D. Fla. July 29, 2010) ($1,158.13); *Maker's Mark Distillery, Inc.* v. *Diageo N. Am., Inc.*, 2010 WL 2651186, at *3 (W.D. Ky. June 30, 2010) ($190); *Flores-Torres* v. *Holder*, 2010 WL 1910011, at *2 (N.D. Cal. May 11, 2010) (portion of $12,083.14); *Merck Sharp & Dohme Pharm., SRL* v. *Teva Pharm. USA, Inc.*, 2010 WL 1381413, at *6 (D.N.J. Mar. 31, 2010) ($250); *Hynix Semiconductor Inc.* v. *Rambus Inc.*, 697 F. Supp. 2d 1139, 1150 (N.D. Cal. 2010) ($1,977.43); *Del. Valley Floral Group, Inc.* v. *Shaw Rose Nets, L.L.C.*, 2009 WL 5127941, at *4 (S.D. Fla. Nov. 6, 2009) ($275); *Porcelanas Florencia, S.A.* v. *Caribbean Resort Suppliers, Inc.*, 2009 WL 1456338, at *8 (S.D. Fla. May 22, 2009) ($922.50); Pet. App. 22a (portion of $5,517.20); *Gidding* v. *Anderson*, 2008 WL 5068524, at *1 (N.D. Cal. Nov. 24, 2008) ($7,363.19); *Zayas* v. *Puerto Rico*, 451 F. Supp. 2d 310, 318 (D.P.R. 2006) ($1,426.15); *Competitive Techs.* v. *Fujitsu Ltd.*, 2006 WL 6338914, at *11 (N.D. Cal. Aug. 23, 2006) (portion of $12,594.57); *Aerotech Res., Inc.* v. *Dodson Aviation, Inc.*, 237 F.R.D. 659, 665-666 (D. Kan. 2005) (portion of $2,661.32); *Dattner* v. *Conagra Foods, Inc.*, 2005 WL 1963937, at *1 (S.D.N.Y. Aug. 16, 2005) ($9,022.48), vacated per curiam, 458 F.3d 98 (2d Cir. 2006); *Tharo Sys., Inc.* v. *Cab Produkttechnik*, 2005 WL 1123595, at *2 (N.D. Ohio May 10, 2005) ($2,507); *V-Formation, Inc.* v. *Benetton Grp. SPA*, 2003 WL 21403326, at *3 (S.D.N.Y. June 17, 2003) ($781); *Shared Med. Sys.* v. *Ashford Presbyterian Cmty. Hosp.*, 212 F.R.D. 50, 55 (D.P.R. 2002) ($275.30); *Neles-Jamesbury, Inc.* v.

In the cases cited by Taniguchi where the court awarded both the cost of translating speech and the cost of translating documents, moreover, the latter was not invariably larger than the former. In fact, the cost of translating documents was nearly as often *less*.[13]

b. Taniguchi's own evidence thus demonstrates that document-translation-cost awards are generally quite modest. He nevertheless insists that there is an inherent risk of high awards because "the broad latitude to conduct discovery can permit [a party] wide discretion to decide how many documents to discover and translate." Pet. Br. 38. This ignores the critical fact that Section 1920 "is phrased permissively"—it provides that a judge or clerk "may tax" the listed items as costs—and that, in tandem with Rule 54(d), Section 1920 thus "grants a federal court discretion to refuse to tax costs in favor of the prevailing party" in an appropriate case. *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987).

Accordingly, in those circuits in which the costs of translating documents are taxable, a "district court [does] not grant translation costs * * * carte blanche." *Studiengesellschaft Kohle mbH* v. *East-*

Fisher Controls Int'l, Inc., 140 F. Supp. 2d 104, 106-107 (D. Mass. 2001) ($10,989); *Pan Am. Grain Mfg. Co.* v. *Puerto Rico Ports Auth.*, 193 F.R.D. 26, 38 (D.P.R. 2000) ($155 and $317.13), aff'd, 295 F.3d 108 (1st Cir. 2002).

[13] See *Hynix Semiconductor*, 697 F. Supp. 2d at 1149-1150 ($17,252.42 for translating speech and $1,977.43 for translating documents); *Tharo Sys.*, 2005 WL 1123595, at *1-2 ($8,893.12 for translating speech and $2,507 for translating documents); *Pan Am. Grain Mfg.*, 193 F.R.D. at 38, 42 ($712.50 for translating speech and $472.13 for translating documents).

man Kodak Co., 713 F.2d 128, 133 (5th Cir. 1983). Instead, the "proper standard for the award of translation costs [is] whether they were necessarily [and reasonably] incurred." *Ibid.* In making that determination, a district court must "examine the possibility that only parts of the translation costs should be assessed," because the losing party "should not have to bear the cost of translating every [foreign] document irrespective of its value to the litigation." *Ibid.* A district court "may, for example, choose to assess the cost of translating only titles and subtitles of all discovered documents plus the cost of translations of those documents which, based upon their titles, appear to be relevant to the litigation." *Ibid.* Consistent with these principles, district courts throughout the country routinely have exercised their discretion to limit—or deny entirely—awards for the cost of translating documents.[14]

To place meaningful limits on cost awards for document translation, therefore, Congress did not

---

[14] See *Conn* v. *Zakharov*, 2010 WL 2293133, at *3 (N.D. Ohio June 4, 2010) (denying award because prevailing party "failed to address why such excessive translation costs were necessary"); *Maker's Mark Distillery*, 2010 WL 2651186, at *3 (limiting award because court "cannot determine whether [the] translations * * * were * * * necessary"); *Competitive Techs.*, 2006 WL 6338914, at *11 (limiting award because there was not "sufficient information to allow the Court to determine whether [certain translations] were necessary"); *Arboireau* v. *Adidas Salomon AG*, 2002 WL 31466564, at *6 (D. Or. June 14, 2002) (denying award because prevailing party made "no showing that [a] * * * translator was necessary"); *Oetiker* v. *Jurid Werke, GmbH*, 104 F.R.D. 389, 393 (D.D.C. 1982) (denying award because "defendant has failed to provide the court with sufficient factual information to support th[e] conclusion * * * that the translations * * * were necessary").

have to impose a categorical ban, as Taniguchi suggests. Those awards instead are subject to the same limitation that governs all cost awards: a district court's authority—indeed, responsibility—to deny or limit an award if the costs were unnecessary, unreasonable, or otherwise unwarranted.

It is telling, in this connection, that the only cases that Taniguchi's *amicus* cites—apart from *Ortho-McNeil*—to support its claim that "translation expenses have totaled over $100,000," NAJIT Br. 17, are not cases in which the court actually *awarded* that amount. See *id.* at 17-18. In one, the court had no occasion to decide whether the costs were necessary and reasonable, because the recovery of such costs was categorically precluded under the Seventh Circuit's decision in *Extra Equipamentos* (although the total cost award was still nearly $400,000). See *Trading Techs. Int'l, Inc.* v. *eSpeed, Inc.*, 750 F. Supp. 2d 962, 983 n.10, 986 (N.D. Ill. 2010). In the other case, the court granted a pre-trial motion for a bond, the size of which was based, in part, on the court's "estimate" of the amount the moving party "expect[ed] to incur" in translating documents. *Gabriel Techs. Corp.* v. *Qualcomm Inc.*, 2010 WL 3718848, at *12 (S.D. Cal. Sept. 20, 2010). Similarly, while Taniguchi's *amicus* cites a case in which "accumulated translation expenses ($47,571.86) were more than ten times that of interpreter fees ($3,900)," NAJIT Br. 18, the court in that case found that it was not "possible to validate [the] claim[]" for document-translation costs and directed the party to re-submit its bill of costs with additional information. *E. & J. Gallo Winery* v. *Andina Licores S.A.*, 2007 WL 1589546, at *2 (E.D. Cal. June 1, 2007).

c. In adopting the position that Taniguchi advocates, the Seventh Circuit expressed concern about requiring district courts to "wade into" the question whether "translation of written documents [was] necessary" in a particular case. *Extra Equipamentos*, 541 F.3d at 728. Taniguchi's *amicus* echoes this sentiment. NAJIT Br. 20-23. But a majority of courts have been allowing an award of costs for translating documents since the enactment of Section 1920(6) in 1978—and, indeed, for at least 40 years before that (although the precise source of the authority for doing so was not entirely clear). Courts have thus been making the determination of whether such costs were necessary for more than 70 years without any evident difficulty.[15]

In any event, *all* courts, including those in the Seventh Circuit, must determine the necessity and reasonableness of a particular expenditure for the categories of costs that are *indisputably* taxable under Section 1920(6)—including the costs of interpret-

---

[15] See, *e.g.*, *Raffold Process Corp.* v. *Castanea Paper Co.*, 25 F. Supp. 593, 594 (W.D. Pa. 1938) (awarding translation costs because they were "necessarily obtained for use in defense of this action"); *Bennett Chem. Co.* v. *Atl. Commodities, Ltd.*, 24 F.R.D. 200, 204 (S.D.N.Y. 1959) (awarding translation costs in total amount of $9.50 because "the translations were necessary for use in the action"); *Kaiser Indus. Corp.* v. *McLouth Steel Corp.*, 50 F.R.D. 5, 11-12 (E.D. Mich. 1970) (awarding translation costs representing some portion of $3,033.27 because "the items being translated were reasonably necessary for a proper determination of the issues"); *Lockett* v. *Hellenic Sea Transps., Ltd.*, 60 F.R.D. 469, 473 (E.D. Pa. 1973) (awarding translation costs in total amount of $200 because "[the] translation was necessary").

ing speech.[16] There is no reason to think that that determination is any more difficult for translation of written words than for translation of spoken words. The supposed "administrative burden[s]" identified by Taniguchi's *amicus*, for example, NAJIT Br. 20; see *id.* at 20-23, apply equally to written and oral translation.

Taniguchi himself does not contend that the "necessity" determination is in fact more difficult for translation of writing than for translation of speech. Instead, he claims that Section 1920(6) "is not cabined by any * * * necessity limitation" at all. Pet. Br. 40. But that view is fundamentally inconsistent with the discretionary character of Section 1920 and Rule 54(d), and with the many decisions in which district courts have exercised their discretion. Unsurprisingly, therefore, Taniguchi cites no authority to support the proposition that *un*necessary interpreter costs are recoverable.

d. There is also no merit to Taniguchi's suggestion that allowing taxation of the costs of translating documents will inevitably disadvantage "immigrants

---

[16] See, *e.g.*, *LG Elecs. U.S.A., Inc.* v. *Whirlpool Corp.*, 2011 WL 5008425, at *9 (N.D. Ill. Oct. 20, 2011) (costs for "oral interpretation services" were "reasonable"); *Osorio* v. *Dole Food Co.*, 2010 WL 3212065, at *8 (S.D. Fla. July 7, 2010) (determining "reasonable and necessary expenses connected with interpreters"); *Hynix Semiconductor*, 697 F. Supp. 2d at 1150 (interpreter was "reasonably required" for deposition); *Ortho-McNeil Pharm., Inc.* v. *Mylan Labs. Inc.*, 2008 WL 7384877, at *10 (N.D. W. Va. Aug. 18, 2008) (some of the interpreter costs "were in no way necessary for litigation"), aff'd in part, vacated in part, 569 F.3d 1353 (Fed. Cir. 2009); *Pan Am. Grain Mfg.*, 193 F.R.D. at 42 (costs "for interpretation of testimony" were "necessary and reasonable").

and non-English speakers, who may be particularly likely to have non-English documents." Pet. Br. 39. Taniguchi focuses on cases in which "the other side" obtains the documents in discovery and has them translated for their own use. *Id.* at 38. He ignores the cases in which immigrants or non-English speakers have non-English documents translated *themselves* for submission to the court. In the latter cases, the rule we advocate will *benefit* the litigants about whom Taniguchi expresses concern, because they will be able to recover their translation costs if they prevail. See, *e.g.*, *Flores-Torres* v. *Holder*, 2010 WL 1910011, at *3 (N.D. Cal. May 11, 2010) (taxing costs against government in immigration case where prevailing party had obtained "translations of numerous foreign law documents which were of material aid to the Court in resolving th[e] case"). Under the rule Taniguchi advocates, by contrast, these parties will be *un*able to recover their translation costs whether they lose or win.

2. Taniguchi also argues that allowing courts to tax the cost of speech translation but not of document translation is "a reasonable accommodation of foreign nations that have expressed concerns about the impact of United States discovery obligations upon foreign nationals." Pet. Br. 40. If Congress had chosen "to include document translation expenses within the scope of section 1920," according to Taniguchi, foreign nationals who litigate in United States courts "would not only be subject to the expansive document discovery objected to by some other nations," but "could additionally be required to pay the potentially large cost of translating those same documents into English." *Id.* at 41. This argument is flawed in multiple ways.

First, Taniguchi identifies no evidence in the legislative record, and we are aware of none, suggesting that Congress was in fact motivated by any such concern.

Second, there is no basis even for speculating that Congress *may* have been motivated by it, because, as we have explained, cost awards for translating documents are typically modest.

Third, the French "blocking statute" cited by Taniguchi, Pet. Br. 40-41, does not support the distinction he claims that Congress drew between speech and documents in Section 1920(6). The blocking statute prohibits both disclosures "in writing" and those made "orally," *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Ct.*, 482 U.S. 522, 526 n.6 (1987) (quoting French Penal Code Law No. 80-438 art. 1A), and all agree that Section 1920(6) authorizes a court to order the losing party to pay the costs of translating oral disclosures.

Fourth, Taniguchi is mistaken in his suggestion that Section 1920(6) must be construed in light of the presumption that Congress intends to avoid unreasonable interference with the sovereign authority of other nations. Pet. Br. 41. "This rule of construction reflects principles of customary international law * * * limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004). The rule does not apply here, because Section 1920(6) authorizes taxation of costs only against a plaintiff—like Taniguchi—that initiated the case in an American court or a defendant with respect to which jurisdiction was by definition proper.

In any event, the possibility of typically modest cost awards in cases in which the prevailing party had a need to translate documents, the losing party is a foreign national, and the district court exercises its discretion to tax some or all of the translating costs hardly rises to the level of unreasonable interference with the sovereign authority of other nations. It is therefore unsurprising that no foreign government or international organization has filed an *amicus* brief in this case suggesting that the rule that has long been applied by a majority of courts has any materially adverse effect on foreign parties.

Finally, it bears emphasis that our interpretation of Section 1920(6) does not invariably operate to the detriment of foreign parties, and frequently operates to their benefit. Like "immigrants and non-English speakers" in the United States, Pet. Br. 39, foreign parties often have their own documents translated into English for submission to an American court. Under the interpretation that Taniguchi advocates, foreign parties will be unable to recover those translation costs whether they win or lose. Under the interpretation that we advocate, they will be able to recover the costs if they win. Indeed, that was precisely the situation in the *Ortho-McNeil* case that Taniguchi criticizes. See *Ortho-McNeil Pharm., Inc.* v. *Mylan Labs. Inc.*, 2008 WL 7384877, at *10 (N.D. W. Va. Aug. 18, 2008) ("the costs [Daiichi] incurred to translate foreign-language documents into English" encompassed "translation costs for those documents included on the trial exhibit list and translated for the Court's *in camera* review of its privilege log"), aff'd in part, vacated in part, 569 F.3d 1353 (Fed. Cir. 2009).

D. The Court Interpreters Act Does Not Suggest That Those Who Translate Written Words Are Excluded From Section 1920(6)

In arguing that Section 1920(6) covers speech but not writing, Taniguchi places heavy emphasis on both the "structure" and the "legislative history," Pet. Br. 25, 33, of the Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040 (1978). Neither supports his position.

1. Section 2 of the Court Interpreters Act added two sections to Chapter 119 of Title 28 of the United States Code: 28 U.S.C. § 1827, titled "Interpreters in courts of the United States"; and 28 U.S.C. § 1828, titled "Special interpretation services." As originally enacted, 28 U.S.C. § 1827 (1976 & Supp. II 1978) required:

- the Director of the Administrative Office of the United States Courts to establish a program to facilitate the use of "interpreters in courts of the United States" (Section 1827(a));
- the Director to certify those who can serve as "interpreters in courts of the United States" (Section 1827(b));
- the presiding judicial officer to use a certified interpreter in "any criminal or civil action initiated by the United States in a United States district court" when necessary to enable a party or witness to comprehend the proceedings (Section 1827(d)); and
- the Director to pay "the salaries, fees, expenses, and costs" incident to providing the serv-

> ices of interpreters in cases initiated by the United States "from sums appropriated to the Federal judiciary," except that such "salaries, fees, expenses, and costs" incurred with respect to government witnesses were to be paid by the Attorney General "from sums appropriated to the Department of Justice," unless, in either event, the presiding judicial officer directed otherwise (Section 1827(g)).

For its part, 28 U.S.C. § 1828 (1976 & Supp. II 1978) required the Director to establish a program for the provision of "special interpretation services" in "multidefendant criminal actions and multi-defendant civil actions" that are "initiated by the United States" (Section 1828(a)) and provided that the expenses incident to these "special interpretation services" were to be paid "from sums appropriated to the Federal judiciary," unless a presiding judicial officer directed otherwise (Section 1828(c)).

Section 7 of the Court Interpeters Act added a new subsection to Section 1920, titled "Taxation of costs," in Chapter 123 of Title 28 of the United States Code. The new subsection is the one at issue in this case, 28 U.S.C. § 1920(6), which authorizes a federal judge or clerk to tax as costs "[c]ompensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpetation services under section 1828 of this title."

As originally enacted, subsection (k) of 28 U.S.C. § 1827 (1976 & Supp. II 1978) provided that interpretation would be "in the consecutive mode except that the presiding judicial officer, with the approval of all interested parties, may authorize a simultaneous or summary interpretation" in certain circumstances. Taniguchi points out that "the

simultaneous, consecutive, and summary modes are all methods of interpretation that apply to live proceedings" and are "inapplicable to the translation of written documents outside the courtroom." Pet. Br. 26. He contends that "the primary, substantive provisions set out in section 2 of the Court Interpreters Act" thus "use the word 'interpreter' in a manner limited to oral, in-court interpretation" and that "the same word in section 7 of that statute, which created subsection 1920(6), naturally carries the same meaning." *Id.* at 27. This contention should be rejected.

First, even assuming that Section 2 is "limited to oral, in-court interpretation," as Taniguchi maintains, Pet. Br. 27, there is no reason to believe that Section 7 "carries the same meaning," *ibid.* To begin with, the two sections employ different language. Section 2 covers "interpreters in courts of the United States" and "special interpretation services," the respective titles of the sections of the United States Code—1827 and 1828—that Section 2 added. By contrast, Section 7 covers—in addition to "court appointed experts"—"interpreters" and "special interpretation services under section 1828 of this title."

"[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (internal quotation marks omitted). The unqualified use of "interpreters" in Section 7 suggests a broader meaning than that of "interpreters in courts of the United States" in Section 2, such that, if the duties of "interpreters in courts of the United States" are in fact "limited to oral, in-court interpretation," Pet. Br. 27, then the duties of "inter-

preters" are not so limited. There is particular justification for that conclusion because 28 U.S.C. § 1920(6) specifically authorizes taxation of costs for "salaries, fees, expenses, and costs of special interpetation services under section 1828 of this title" but does not include comparable language from Section 1827 as originally enacted.

This reading finds additional support in the location of Sections 1827 and 1920 in Title 28 of the United States Code. The Court Interpreters Act placed Section 1827 in Chapter 119 of Title 28, which is titled "Evidence; Witnesses" and covers in-court testimony. Other chapters of Title 28 cover out-of-court testimony (Chapter 117, titled "Evidence; Depositions") and documentary evidence (Chapter 115, titled "Evidence; Documentary"). Unlike Section 1827, Section 1920(6) was placed in Chapter 123, titled "Fees and Costs," which is not limited to any particular type of evidence, or even to the subject of evidence generally.

In this connection, it bears mention that Taniguchi's assertion that "interpreters" in Section 1920(6) is "limited to oral, in-court interpretation," Pet. Br. 27, is inconsistent with his recognition elsewhere in his brief that the term extends (at least) to interpretation at depositions, see *id.* at 7, 38. That acknowledgement, by itself, undermines his claim that the scope of Section 7 of the Court Interpreters Act should be understood as coextensive with that of Section 2.

Section 1827 as originally enacted differs from Section 1920(6), not only in the sense that it uses narrower language and was placed under the heading of "Witnesses," but also in the sense that it applies only in cases "initiated by the United States"

and provides that the costs of interpreters in those cases will ordinarily be paid from "sums appropriated to the Federal judiciary." Almost all of the cases in which Section 1920(6) applies are civil cases between private parties, in which the government will not have to pay for interpreters. Insofar as a narrow construction of Section 2 of the Court Interpreters Act might be warranted because it mandates a service that is funded by taxpayers, therefore, that concern does not justify a narrow construction of Section 7.

Second, it is hardly clear that the duties of interpreters under Section 2 of the Court Interpreters Act are in fact "limited to oral, in court interpretation." Pet. Br. 27. In support of that claim, Taniguchi places heavy reliance on the 2011 version of a document called "Guide to Judiciary Policy" that was prepared by the Director of the Administrative Office of the United States Courts. *Id.* at 23, 27. But he ignores a series of documents issued by the Director that undermine his claim.

Three years after passage of the Court Interpreters Act, and for twelve years after that, the Director published notices in the *Federal Register* announcing that the Administrative Office would be conducting a certification examination for "interpreters in courts of the United States in accordance with the Court Interpreters Act." *Interpreters in Courts of the United States; Announcement of Spanish/English Certification Examination*, 46 Fed. Reg. 60,636, 60,636 (Dec. 11, 1981). In a section titled "Duties," those notices stated:

> Court interpreters perform all or some of the following duties: (1) Interpret verbatim in simultaneous, consecutive, or summary mode

> a foreign language into English, and vice versa, at arraignments, preliminary hearings, pretrial hearings, trials, and other court proceedings; (2) *transcribe from electronic sound recordings*; and (3) *translate technical, medical and legal documents and correspondence for introduction as evidence.*

Ibid. (emphasis added).[17] A year later, the Director published a similar notice in the *Federal Register*, which stated that the duties of "[c]ourt interpreters" include—in addition to "[i]nterpret[ing] verbatim in simultaneous and consecutive modes"—"transcrib[ing] and translat[ing] electronic sound recordings" and "sight translat[ing] or translat[ing] in written form technical, medical, and legal documents and correspondence for introduction as evidence." *Interpreters in Courts of the United States; Announcement of Written Segment of Certification Examination for Spanish, Cantonese, Mandarin, and Korean; and Written Segment of "Otherwise Qualified" Examina-*

---

[17] Accord *Interpreters in Courts of the United States; Announcement of Spanish/English Certification Examination*, 48 Fed. Reg. 28,508, 28,509 (June 22, 1983) (same); *Interpreters in Courts of the United States; Announcement of Spanish/English Certification Examination*, 50 Fed. Reg. 11,524, 11,525 (Mar. 22, 1985) (same); *Interpreters in Courts of the United States; Announcement of Spanish/English Certification Examination*, 51 Fed. Reg. 44,496, 44,497 (Dec. 10, 1986) (same); *Interpreters in Courts of the United States; Announcement of Spanish/English Certification Examination*, 53 Fed. Reg. 43,744, 43,745 (Oct. 28, 1988) (same); *Interpreters in Courts of the United States; Announcement of Spanish/English Certification Examination*, 56 Fed. Reg. 5,794, 5,795 (Feb. 13, 1991) (same); *Interpreters in Courts of the United States; Announcement of Spanish/English Certification Examination*, 58 Fed. Reg. 13,736, 13,737 (Mar. 15, 1993) (same).

tion for Arabic, Hebrew, Italian, Mien, Polish, and Russian, 59 Fed. Reg. 30,333, 30,334 (June 13, 1994).

These *Federal Register* notices, which reflect the Administrative Office's consistently held understanding of the job description of a "court interpreter" for at least 16 years after the enactment of the Court Interpreters Act, are flatly inconsistent with Taniguchi's assertion that the duties of interpreters under Section 2 of the Act are limited to oral interpretation in "the simultaneous, consecutive, and summary modes." Pet. Br. 26. They are instead entirely consistent with the "professional literature," *id.* at 17, which recognizes that the duties of court interpreters include forms of translation that are neither strictly "oral" nor strictly "written," as well as forms of translation that are unambiguously "written." The notices are also consistent with the Local Rules of the United States District Court for the District of Puerto Rico, which provide that "documents not in the English language * * * must be accompanied by a certified translation into English prepared by *an interpreter certified by the Administrative Office of the United States Courts*." D.P.R. R. 5(g) (emphasis added). Indeed, if it is true, as Taniguchi's *amicus* urges, that "[t]he Administrative Office's definition of 'interpreter' for purposes of the [Court Interpreters] Act * * * should be given deference" in this case, NAJIT Br. 10, then the Court should defer to the Director's view that an "interpreter" interprets, transcribes, and translates.

2. The legislative history of the Court Interpreters Act does not support Taniguchi's reading of 28 U.S.C. § 1920(6) either.

First, Taniguchi points to statements in the legislative history indicating that one of the motivations

for the legislation that became the Court Interpreters Act was that criminal defendants may have a constitutional right to a court interpreter, so that they can understand the proceedings. Pet. Br. 33. But that does not show that the law that was ultimately enacted was meant to exclude written translation—much less that the part of the law that amended the cost statute was meant to do so, particularly since the cost statute ordinarily applies only in civil cases.

Second, Taniguchi relies on materials placed before a House subcommittee considering the legislation that identified certain differences between "interpreters" and "translators." Pet. Br. 34. But that hardly means that Congress intended to use "interpreter" in the narrow sense that Taniguchi advocates in the provision of the Court Interpreters Act that amended the cost statute, especially because "interpreters" and "translators" perform many of the same functions during litigation.

Third, a draft of the legislation that ultimately became the Court Interpreters Act provided that the record on appeal in Spanish-language cases litigated in the District of Puerto Rico must be translated into English and that the cost of the translation must be paid by the district court or the parties, as the court may direct. H.R. 10228, 95th Cong. § 3 (1977). In testimony conveying the views of the Judicial Council of the First Circuit, Judge Coffin expressed concern that "the preparation of a translated record for appeal would take from four to ten times as long as at present" and lead to "increased costs." *Court Interpreters Act: Hearing on H.R. 10228, H.R. 10129, and S. 1315 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the*

Judiciary, 95th Cong. 93 (1978). The provision was not included in the law that was enacted. Taniguchi argues that, "[h]aving considered and rejected a far more cabined proposal specifically permitting the assignment of certain translation costs to parties in only a single district," Congress "cannot reasonably be imagined to have adopted a far more expansive provision permitting taxation of translation costs to parties in subsection 1920(6)." Pet. Br. 35.

This is a *non sequitur*. Even if one assumes that the provision in question was deleted because of the concerns expressed by Judge Coffin, it does not follow that Congress must have intended to exclude written translation from the scope of Section 1920(6). The deleted provision *required* translation that would not otherwise have been undertaken, and so necessitated the expenditure of time and costs that would not otherwise have been borne by *anyone*. This case, by contrast, involves the situation in which the prevailing party has *chosen* to have documents translated; the only question is whether the losing party may be required to pay the costs of translation, as opposed to having the prevailing party bear the costs itself. This case, in other words, is not about saving costs but about allocating costs that have already been expended. The deleted provision cited by Taniguchi has nothing to do with that.

Finally, Taniguchi contends that "no statement in the legislative history indicates that subsection 1920(6) was to apply to the translation of written materials." Pet. Br. 36. But no statement in the legislative history indicates that Section 1920(6) was *not* to apply to the translation of written materials. The legislative history simply does not address the question.

If anything, the legislative history supports *our* position, because, consistent with common usage, the legislators and staff who drafted the Court Interpreters Act used "interpretation" and "translation" interchangeably in the very items of legislative history on which Taniguchi relies.[18] Indeed, the legislative history routinely employs the word "translation" even in connection with "the simultaneous, consecutive, and summary modes," Pet. Br. 26, which, as Taniguchi emphasizes, are unambiguously forms of "oral * * * interpretation," *id.* at 27.[19]

E. There Is No Other Persuasive Evidence That Those Who Translate Written Words Are Excluded From Section 1920(6)

Taniguchi claims to find further support for his narrow reading of "interpreter" in Section 1920(6) in "the use of the word 'interpreter' in procedural rules dealing with interpreters," Pet. Br. 29; in a supposed

---

[18] See, *e.g.*, H.R. Rep. No. 95-1687, at 4 (1978) ("According to testimony by proponents of this legislation, the appointment of certified interpreters is designed to insure not only an accurate translation but also an impartial one."); S. Rep. No. 95-569, at 1 (1977) ("The bill as originally introduced provided for translation services only for non-English-speaking people in the Federal courts.").

[19] See, *e.g.*, H.R. Rep. No. 95-1687, at 7 (referring to "simultaneous translation," "the consecutive mode" of "translat[ing]," and "[s]ummary translations"); S. Rep. No. 95-569, at 8 (referring to "[s]imultaneous translation," "[c]onsecutive translation," and "summary translation"); 119 Cong. Rec. 14,449 (1977) (statement of Sen. Tunney) (proposed legislation "provid[es] for the simultaneous translation of all courtroom proceedings—in a manner very similar to the method used by the United Nations—in both criminal and civil matters").

"congressional convention extending throughout the United States Code," *id.* at 30; and in the canon favoring narrow construction of "a statute in derogation of the common law," *id.* at 36. Each theory is groundless.

1. Rule 43(d) of the Federal Rules of Civil Procedure authorizes a court to "appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs." Fed. R. Civ. P. 43(d). Rule 604 of the Federal Rules of Evidence "implements" what is now Rule 43(d) of the Federal Rules of Civil Procedure, Fed. R. Evid. 604 advisory committee's note (1972), by subjecting an "interpreter" to provisions of the Rules of Evidence "relating to qualification as an expert and the administration of an oath or affirmation to make a true translation," Fed. R. Evid. 604. Quoting a treatise, Taniguchi contends that, "[f]or purposes of Rules 43(d) and 604, 'an "interpreter" is a person who renders intelligible a statement made in a courtroom by a person whose statement would not otherwise be intelligible to others in the courtroom.'" Pet. Br. 29 (quoting 27 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure* § 6053, at 352 (2d ed. 2007)). He goes on to argue that "the word 'interpreter' in Rules 43 and 604" thus "excludes translators of written documents" and that "the word should similarly be so read in subsection 1920(6)." *Id.* at 30.

This argument disregards the basic principle that "[t]he construction of statutory language often turns on context." *FCC* v. *AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011). The context of Rule 43 is that it "governs the taking of testimony." 8 James W. Moore, *Moore's Federal Practice* ch. 43 intro., at 43-1

(3d ed. 2011). That "limited scope" is "reflect[ed]" in the Rule's "title," 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2401, at 192 (3d ed. 2008), which, not coincidentally, is "Taking Testimony." It might therefore be sensible to construe "interpreter" in Rules 43 and 604 as limited to "oral interpretation." Pet. Br. 29. But Section 1920(6), which governs taxation of costs, is not limited to the subject of a court's taking testimony, and so Rule 43 provides no basis for a narrow reading of "interpreter" in Section 1920(6). "[M]ost words have different shades of meaning and consequently may be variously construed," especially "when they occur in different statutes." *Envtl. Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (quoting *Atl. Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932)). "Context counts." *Id.* at 576.

Taniguchi's assertion that "interpreter" in Section 1920(6) has the same meaning as in Rule 43 also suffers from an independent flaw: his recognition that an "interpreter" under the cost statute is *not* merely, as he says it is under Rule 43, "a person who renders intelligible a statement made *in a courtroom* by a person whose statement would not otherwise be intelligible to others *in the courtroom*." Pet. Br. 29 (internal quotation marks omitted; emphasis added). As Taniguchi elsewhere acknowledges, *id.* at 7, 38, an "interpreter" under Section 1920(6) also includes (at the very least) a person who translates orally at depositions, which of course occur *outside* the courtroom. So even Taniguchi must concede that "interpreter" has a broader meaning in Section 1920(6) than in Rule 43.

2. Taniguchi next contends that "the limitation of the word 'interpreter' to one engaging in live, oral

interpretation is part of a broader congressional convention extending throughout the United States Code," which, he says, "adheres to [a] distinction between 'interpreters' and 'translators.'" Pet. Br. 30. That contention is mistaken.

Taniguchi and his *amicus* collectively cite seven other provisions of the United States Code that use the statutory term at issue here ("interpreters"). Pet. Br. 30-32; NAJIT Br. 13-14. Two of them mention "interpreters" who make "aurally delivered materials available to individuals with hearing impairments." 26 U.S.C. § 44(c)(2)(B); 42 U.S.C. § 12103(1)(A). These provisions demonstrate only that that is the particular type of "interpreter" with which the statutes are concerned; they do not show that it is the *only* type. If it were, the term would exclude even those who translate orally for non-hearing-impaired "persons who speak only or primarily a language other than the English language." 28 U.S.C. § 1827(b)(1). Taniguchi obviously does not take that position.

Two other provisions require the use of "interpreters" in courts-martial or military commissions. 10 U.S.C. § 828; 10 U.S.C. § 948*l*(b). It is not at all clear, as Taniguchi's *amicus* contends, that these provisions "plainly refer[] to oral interpretation." NAJIT Br. 13. But even if they do, the reason is their context; both provisions address "the proceedings of and testimony taken" before the court or commission. 10 U.S.C. § 828; 10 U.S.C. § 948*l*(a). There is no comparable language in 28 U.S.C. § 1920(6).

The three other provisions use the phrase "interpreters and translators," 8 U.S.C. § 1555; 28 U.S.C. § 530C(b)(1)(I), or "interpreters or translators," 42 U.S.C. § 2991b-3(b)(2). The use of the two terms to-

gether in those provisions does not mean that "interpreters" and "translators" always have different meanings. Unlike 28 U.S.C. § 1920(6), which addresses the costs of services provided in a particular litigation, those three provisions concern "interpreters" and "translators" as *job titles*.[20] Since the professions of "interpreter" and "translator" are typically regarded as distinct (although their duties overlap), it makes sense for these statutes to employ both terms, to ensure that both jobs are covered. But even if that is wrong, "excess language" in statutes is "hardly unusual." *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2249 (2011). Congress sometimes inserts language that is "technically unnecessary" out of "an abundance of caution," *Fort Stewart Sch.* v. *FLRA*, 495 U.S. 641, 646 (1990), in order to "remove any doubt" about the reach of the statute, *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008).

So much for the use of "interpreters" in other statutes. As for "translator," Taniguchi's *amicus* asserts that that term is "used consistently in the [United States] Code to refer to out-of-court, written translation." NAJIT Br. 13. That is not correct. Congress has used "translator" in other statutes to include one

---

[20] See 8 U.S.C. § 1555 ("Appropriations * * * provided for the Immigration and Naturalization Service shall be available for * * * pay of interpreters and translators who are not citizens of the United States"); 28 U.S.C. § 530C(b)(1)(I) ("Funds available to the Attorney General * * * may be used * * * for * * * [p]ayment of interpreters and translators who are not citizens of the United States"); 42 U.S.C. § 2991b-3(b)(2) ("The purposes for which each grant * * * may be used include * * * the establishment of a project to train Native Americans * * * to enable them to serve as interpreters or translators of [Native American] language").

who translates orally, thereby confirming the soundness of the court of appeals' conclusion that "'translation' services" and "'interpretation' services" are commonly used "interchangeabl[y]." Pet. App. 6a.[21]

3. Taniguchi also argues that "[t]he common law . . . ought not to be deemed to be repealed, unless the language of [the] statute be clear and explicit"; that, "[a]t common law, costs were not allowed"; and that Section 1920(6) therefore "should be construed narrowly[,] as a statute in derogation of the common law," to preclude recovery of the costs of translating documents. Pet. Br. 36 (quoting *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1813), and *Alyeska Pipeline*, 421 U.S. at 247; ellipsis added by petitioner). The major and minor premises may be correct, but the conclusion does not follow.

The common-law prohibition on recovery of costs has been clearly and explicitly repealed by statute at least since 1853, when Congress enacted "a far-reaching Act specifying in detail the nature and amount of the taxable items of cost in the federal

---

[21] See 20 U.S.C. § 6319(g)(2) (paraprofessional working in education program supported with federal funds may be assigned to tutor, assist in classroom, assist in computer lab, conduct parental-involvement activities, provide support in library or media center, "act as a translator," or provide instruction to students); Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 6(a)(10), 96 Stat. 1248, 1257 (1982) (guidelines should ensure provision of assistance to victims and witnesses, including "translator services for victims in court"); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub L. No. 109-162, tit. II, § 201(14), 110 Stat. 2960, 2994 (2006) (congressional finding that "[t]he National Domestic Violence Hotline service is available, toll-free, 24 hours a day and 7 days a week, with bilingual staff, access to translators in 150 languages, and a TTY line for the hearing-impaired").

courts." *Alyeska Pipeline*, 421 U.S. at 251-252. The scope of a particular provision of that statute's successor is not subject to the interpretive canon on which Taniguchi relies. As this Court has put it, "[t]he dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law." *Johnson* v. *S. Pac. Co.*, 196 U.S. 1, 17 (1904). "[A]s there is no doubt of that intention here, the extent of the application of the change demands * * * no more rigorous construction than would be applied to [other] laws." *Ibid.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THOMAS L. ROBERTS
Dooley Roberts & Fowler LLP
Orlean Pacific Plaza
Suite 201
865 S. Marine Corps Dr.
Tamuning, Guam 96913
(671) 646-1222

DAN HIMMELFARB
Counsel of Record
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
dhimmelfarb@mayerbrown.com

Counsel for Respondent

JANUARY 2012

APPENDIX

COURT INTERPRETERS ACT

Public Law 95-539
95th Congress
Oct. 28, 1978
[S. 1315]

An Act

To provide more effectively for the use of interpreters in courts of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Court Interpreters Act".

SEC. 2. (a) Chapter 119 of title 28, United States Code, is amended by adding at the end thereof the following new sections:

"§ 1827. Interpreters in courts of the United States

"(a) The Director of the Administrative Office of the United States Courts shall establish a program to facilitate the use of interpreters in courts of the United States.

"(b) The Director shall prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters in courts of the United States in bilingual proceedings and proceedings involving the hearing impaired (whether or not also speech impaired), and in so doing, the Director shall consider the education, training, and experience of those persons. The Director shall maintain a current master list of all interpreters certified by the Director

and shall report annually on the frequency of requests for, and the use and effectiveness of, interpreters. The Director shall prescribe a schedule of fees for services rendered by interpreters.

"(c) Each United States district court shall maintain on file in the office of the clerk of court a list of all persons who have been certified as interpreters, including bilingual interpreters and oral or manual interpreters for the hearing impaired (whether or not also speech impaired), by the Director of the Administrative Office of the United States Courts in accordance with the certification program established pursuant to subsection (b) of this section.

"(d) The presiding judicial officer, with the assistance of the Director of the Administrative Office of the United States Courts, shall utilize the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise competent interpreter, in any criminal or civil action initiated by the United States in a United States district court (including a petition for a writ of habeas corpus initiated in the name of the United States by a relator), if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case), or a witness who may present testimony in such action—

"(1) speaks only or primarily a language other than the English language; or

"(2) suffers from a hearing impairment (whether or not suffering also from a speech impairment)

so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony.

"(e)(1) If any interpreter is unable to communicate effectively with the presiding judicial officer, the United States attorney, a party (including a defendant in a criminal case), or a witness, the presiding judicial officer shall dismiss such interpreter and obtain the services of another interpreter in accordance with this section.

"(2) In any criminal or civil action in a United States district court, if the presiding judicial officer does not appoint an interpreter under subsection (d) of this section, an individual requiring the services of an interpreter may seek assistance of the clerk of court or the Director of the Administrative Office of the United States Courts in obtaining the assistance of a certified interpreter.

"(f)(1) Any individual other than a witness who is entitled to interpretation under subsection (d) of this section may waive such interpretation in whole or in part. Such a waiver shall be effective only if approved by the presiding judicial officer and made expressly by such individual on the record after opportunity to consult with counsel and after the presiding judicial officer has explained to such individual, utilizing the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise competent interpreter, the nature and effect of the waiver.

"(2) An individual who waives under paragraph (1) of this subsection the right to an interpreter may utilize the services of a non-certified interpreter of such individual's choice whose fees, expenses, and costs shall be paid in the manner provided for the payment of such fees, expenses, and costs of an interpreter appointed under subsection (d) of this section.

"(g)(1) Except as otherwise provided in this subsection or section 1828 of this title, the salaries, fees, expenses, and costs incident to providing the services of interpreters under subsection (d) of this section shall be paid by the Director of the Administrative Office of the United States Courts from sums appropriated to the Federal judiciary.

"(2) Such salaries, fees, expenses, and costs that are incurred with respect to Government witnesses shall, unless direction is made under paragraph (3) of this subsection, be paid by the Attorney General from sums appropriated to the Department of Justice.

"(3) The presiding judicial officer may in such officer's discretion direct that all or part of such salaries, fees, expenses, and costs shall be apportioned between or among the parties or shall be taxed as costs in a civil action.

"(4) Any moneys collected under this subsection may be used to reimburse the appropriations obligated and disbursed in payment for such services.

"(h) In any action in a court of the United States where the presiding judicial officer establishes, fixes, or approves the compensation and expenses payable to an interpreter from funds appropriated to the Federal judiciary, the presiding judicial officer shall

not establish, fix, or approve compensation and expenses in excess of the maximum allowable under the schedule of fees for services prescribed pursuant to subsection (b) of this section.

"(i) The term 'presiding judicial officer' as used in this section and section 1828 of this title includes a judge of a United States district court, a United States magistrate, and a referee in bankruptcy.

"(j) The term 'United States district court' as used in this section and section 1828 of this title includes any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States established by section 132 of this title.

"(k) The interpretation provided by certified interpreters pursuant to this section shall be in the consecutive mode except that the presiding judicial officer, with the approval of all interested parties, may authorize a simultaneous or summary interpretation when such officer determines that such interpretation will aid in the efficient administration of justice. The presiding judicial officer on such officer's motion or on the motion of a party may order that special interpretation services as authorized in section 1828 of this title be provided if such officer determines that the provision of such services will aid in the efficient administration of justice.

"§ 1828. Special interpretation services

"(a) The Director of the Administrative Office of the United States Courts shall establish a program for the provision of special interpretation services in criminal actions and in civil actions initiated by the United States (including petitions for writs of habeas corpus initiated in the name of the United States by

relators) in a United States district court. The program shall provide a capacity for simultaneous interpretation services in multidefendant criminal actions and multidefendant civil actions.

"(b) Upon the request of any person in any action for which special interpretation services established pursuant to subsection (a) are not otherwise provided, the Director, with the approval of the presiding judicial officer, may make such services available to the person requesting the services on a reimbursable basis at rates established in conformity with section 501 of the Act of August 31, 1951 (ch. 376, title 5, 65 Stat. 290; 31 U.S.C. 483a), but the Director may require the prepayment of the estimated expenses of providing the services by the person requesting them.

"(c) Except as otherwise provided in this subsection, the expenses incident to providing services under subsection (a) of this section shall be paid by the Director from sums appropriated to the Federal judiciary. A presiding judicial officer, in such officer's discretion, may order that all or part of the expenses shall be apportioned between or among the parties or shall be taxed as costs in a civil action, and any moneys collected as a result of such order may be used to reimburse the appropriations obligated and disbursed in payment for such services.

"(d) Appropriations available to the Director shall be available to provide services in accordance with subsection (b) of this section, and moneys collected by the Director under that subsection may be used to reimburse the appropriations charged for such services. A presiding judicial officer, in such officer's discretion, may order that all or part of the

expenses shall be apportioned between or among the parties or shall be taxed as costs in the action.".

(b) The table of sections for chapter 119 of title 28, United States Code, is amended by adding at the end thereof the following:

"1827. Interpreters in courts of the United States.

"1828. Special interpretation services.".

SEC. 3. Section 604(a) of title 28, United States Code, is amended—

(a) by striking out paragraph (10) and inserting in lieu thereof:

"(10)(A) Purchase, exchange, transfer, distribute, and assign the custody of lawbooks, equipment, supplies, and other personal property for the judicial branch of Government (except the Supreme Court unless otherwise provided pursuant to paragraph (17)); (b) provide or make available readily to each court appropriate equipment for the interpretation of proceedings in accordance with section 1828 of this title; and (C) enter into and perform contracts and other transactions upon such terms as the Director may deem appropriate as may be necessary to the conduct of the work of the judicial branch of Government (except the Supreme Court unless otherwise provided pursuant to paragraph (17)), and contracts for nonpersonal services for pretrial services agencies, for the interpretation of proceedings, and for the provision of special interpretation services pursuant to section 1828 of this title may be awarded without regard to section 3709 of the Revised Statues of the United States (41 U.S. C. 5);";

(b) by redesignating paragraph (13) as paragraph (17); and

(c) by inserting after paragraph (12) the following new paragraphs:

"(13) Pursuant to section 1827 of this title, establish a program for the certification and utilization of interpreters in courts of the United States;

"(14) Pursuant to section 1828 of this title, establish a program for the provision of special interpretation services in courts of the United States;

"(15)(A) In those districts where the Director considers it advisable based on the need for interpreters, authorize the full-time or part-time employment by the court of certified interpreters; (B) where the Director considers it advisable based on the need for interpreters, appoint certified interpreters on a full-time or part-time basis, for services in various courts when he determines that such appointments will result in the economical provision of interpretation services; and (C) pay out of moneys appropriated for the judiciary interpreters' salaries, fees, and expenses, and other costs which may accrue in accordance with the provisions of sections 1827 and 1828 of this title;

"(16) In the Director's discretion, (A) accept and utilize voluntary and uncompensated (gratuitous) services, including services as authorized by section 3102 of title 5, United States Code; and (B) accept, hold, administer, and utilize gifts and bequests of personal property for the purpose of aiding or facilitating the work of the judicial branch of Government, but gifts or bequests of money shall be covered into the Treasury;".

SEC. 4. Section 604 of title 28, United States Code, is amended further by inserting after subsection (e) the following new subsections:

"(f) The Director may make, promulgate, issue, rescind, and amend rules and regulations (including regulations prescribing standards of conduct for Administrative Office employees) as may be necessary to carry out the Director's functions, powers, duties, and authority. The Director may publish in the Federal Register such rules, regulations, and notices for the judicial branch of Government as the Director determines to be of public interest; and the Director of the Federal Register hereby is authorized to accept and shall publish such materials.

"(g)(1) When authorized to exchange personal property, the Director may exchange or sell similar items and may apply the exchange allowance or proceeds of sale in such cases in whole or in part payment for the property acquired, but any transaction carried out under the authority of this subsection shall be evidenced in writing.

"(2) The Director hereby is authorized to enter into contracts for public utility services and related terminal equipment for periods not exceeding ten years.".

SEC. 5. Section 602 of title 28, United States Code, is amended to read as follows:

"§ 602. Employees

"(a) The Director shall appoint and fix the compensation of necessary employees of the Administrative Office in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, relating to classification and General Schedule pay rates.

"(b) Notwithstanding any other law, the Director may appoint certified interpreters in accordance with

section 604(a)(15)(B) of this title without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5, relating to classification and General Schedule pay rates, but the compensation of any person appointed under this subsection shall not exceed the appropriate equivalent of the highest rate of pay payable for the highest grade established in the General Schedule, section 5332 of title 5.

"(c) The Director may obtain personal services as authorized by section 3109 of title 5, at rates not to exceed the appropriate equivalent of the highest rate of pay payable for the highest grade established in the General Schedule, section 5332 of title 5.

"(d) All functions of other officers and employees of the Administrative Office and all functions of organizational units of the Administrative Office are vested in the Director. The Director may delegate any of the Director's functions, powers, duties, and authority (except the authority to promulgate rules and regulations) to such officers and employees of the judicial branch of Government as the Director may designate, and subject to such terms and conditions as the Director may consider appropriate; and may authorize the successive redelegation of such functions, powers, duties, and authority as the Director may deem desirable. All official acts performed by such officers and employees shall have the same force and effect as though performed by the Director in person.".

SEC. 6. Section 603 of title 28, United States Code, is amended by striking out the second paragraph thereof.

SEC. 7. Section 1920 of title 28, United States Code, is amended by striking out the period at the

end of paragraph (5) and inserting a semicolon in lieu thereof and by inserting after paragraph (5) the following new paragraph:

"(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.".

SEC. 8. Section 5(b) of the Act of September 23, 1959 (Public Law 86-370, 73 Stat. 652), is repealed.

SEC. 9. There are authorized to be appropriated to the judicial branch of Government such sums as may be necessary to carry out the amendments made by this Act.

SEC. 10. (a) Except as provided in subsection (b), this Act shall take effect on the date of the enactment of this Act.

(b) Section 2 of this Act shall take effect ninety days after the date of the enactment of this Act.

SEC. 11. Any contracts entered into under this Act or any of the amendments made by this Act shall be limited to such extent or in such amounts as are provided in advance in appropriation Acts.

Approved October 28, 1978.

REPLY BRIEF

SUPREME COURT
FILED
FEB 3 - 2012
OFFICE OF THE CLERK

No. 10-1472

IN THE

Supreme Court of the United States

KOUICHI TANIGUCHI,

Petitioner,

v.

KAN PACIFIC SAIPAN, LTD.,
doing business as Marianas Resort and Spa,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

DOUGLAS F. CUSHNIE
P.O. Box 500949
Saipan, MP 96950
(670) 234-6843

DONALD B. AYER
Counsel of Record
MICHAEL S. FRIED
CHRISTOPHER J. SMITH
JANE E. HOLMAN
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
dbayer@jonesday.com
(202) 879-3939

February 3, 2012

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

I. TRANSLATORS OF WRITTEN TEXTS ARE NOT "INTERPRETERS" 2

A. The Text and Structure of the Court Interpreters Act Exclude Document Translation 2

B. The Consistent Usage of "Interpreters" Throughout the United States Code, and in Related Rules, Confirms the Limited Meaning of That Term 15

II. ANY AMBIGUITY SHOULD BE RESOLVED IN FAVOR OF PETITIONER'S POSITION 16

A. The Legislative History Confirms the Limitation to Spoken Interpretation 16

B. Subsection 1920(6) Should Be Narrowly Construed as a Statute in Derogation of the Common Law 18

III. CONGRESS'S DECISION TO ALLOW COSTS FOR INTERPRETERS BUT NOT TRANSLATORS IS SENSIBLE AS A MATTER OF POLICY 19

A. Good Reasons Support Treating Interpreters Differently From Translators 19

TABLE OF CONTENTS
(continued)

Page

B. Kan Pacific's Contrary Policy Considerations Are Baseless 24

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
421 U.S. 240 (1975) 2, 24

Baez-Eliza v. Instituto Psicoterapeutico,
275 F.R.D. 65 (D.P.R. 2011) 20

Barnhart v. Walton,
535 U.S. 212 (2002) 13

Barone v. Rich Bros. Interstate Display Fireworks Co.,
25 F.3d 610 (8th Cir. 1994) 20

Crawford Fitting Co. v. J.T. Gibbons, Inc.,
482 U.S. 437 (1987) 24

Dong Ah Tire & Rubber Co. v. Glasforms, Inc.,
2010 WL 1691869 (N.D. Cal. Apr. 23, 2010) 20

E. & J. Gallo Winery v. Andina Licores S.A.,
2007 WL 1589546 (E.D. Cal. June 1, 2007) 21

Extra Equipamentos E Exportação Ltda. v. Case Corp.,
541 F.3d 719 (7th Cir. 2008) 20

F. Hoffman-La Roche Ltd. v. Empagran S.A.,
542 U.S. 155 (2004) 23

Fleischmann Distilling Corp. v. Maier Brewing Co.,
386 U.S. 714 (1967) 19

Gabriel Techs. Corp. v. Qualcomm Inc.,
2010 WL 3718848 (S.D. Cal. Sept. 20, 2010) 19

Good Samaritan Hosp. v. Shalala,
508 U.S. 402 (1993) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002) 7, 8

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 12, 13

Hartranft v. du Pont,
118 U.S. 223 (1886) 8

Hynix Semiconductor Inc. v. Rambus Inc.,
697 F. Supp. 2d 1139 (N.D. Cal. 2010) 20, 21

In re Puerto Rico Elec. Power Auth.,
687 F.2d 501 (1st Cir. 1982) 19

Johnson v. South Pacific Co.,
196 U.S. 1 (1904) 18, 19

Kansas v. Colorado,
556 U.S. 98 (2009) 2

La. Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986) 6

Mallard v. United States Dist. Ct.,
490 U.S. 296 (1989) 5, 6

MCI Telecomm. Corp. v. AT&T Co.,
512 U.S. 218 (1994) 5

Oetiker v. Jurid Werke GmbH,
104 F.R.D. 389 (D.D.C. 1982) 21

Ortho-McNeil Pharm., Inc. v. Mylan Labs. Inc.,
569 F.3d 1353 (Fed. Cir. 2009) 19

Osorio v. Dole Food Co.,
2010 WL 3212065 (S.D. Fla. July 7, 2010) 20

Pac. Operators Offshore, LLC v. Valladolid,
__ U.S. __, slip op. (Jan. 11, 2012) 1

TABLE OF AUTHORITIES
(continued)

Page(s)

Republican Party of Minn. v. White,
536 U.S. 765 (2002) 6

Roadway Express, Inc. v. Piper,
447 U.S. 752 (1980) 22

Seltzer v. Foley,
502 F. Supp. 600 (S.D.N.Y. 1980) 11

Smith v. United States,
508 U.S. 223 (1993) 6

Sossamon v. Texas,
131 S. Ct. 1651 (2011) 6

Sullivan v. Stroop,
496 U.S. 478 (1990) 5, 6

Trading Techs. Int'l v. eSpeed, Inc.,
750 F. Supp. 2d 962 (N.D. Ill. 2010) 20

United States v. Prado-Cervantez,
2011 WL 4691934 (D. Kan. Oct. 6, 2011) 10

United States v. Ramsey,
431 U.S. 606 (1977) 5

United States v. Van Auken,
96 U.S. 366 (1877) 5

Watson v. United States,
552 U.S. 74 (2007) 6

STATUTES AND RULES

52 Rev. Stat. 4426 8

10 U.S.C. § 1596b 15

15 U.S.C. § 649 15

18 U.S.C. § 924 6

28 U.S.C. § 1827 ..... 12, 13, 14

TABLE OF AUTHORITIES
(continued)

Page(s)

28 U.S.C. § 1828 ..... 12, 13, 14

28 U.S.C. § 1920(6) ..... *passim*

29 U.S.C. § 1132 8

CAL. GOV'T CODE § 26806(a) 10

Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040 (1978) ..... *passim*

Fed. R. Civ. P. 43(d) 15, 16

Fed. R. Civ. P. 54(d) 21

FLA. STAT. ANN. § 90.606 10

MICH. COMP. LAWS ANN. § 775.19 10

OTHER AUTHORITIES

ABA, Proposed Standards for Language Access in Courts (Feb. 2012), *available at* http://www.courts.ca.gov/documents/Stds_for_Language_Access_FINAL_12-13-2011_w_disclaimer_.pdf 7

THE AMERICAN HERITAGE DICTIONARY 4

William C. Anderson, A DICTIONARY OF LAW (1889) 3

The Bilingual Courts Act: Hearings Before the Subcomm. on Improvements on Judicial Machinery of the S. Comm. on the Judiciary, 93d Cong. 17 (1973) 16

BLACK'S LAW DICTIONARY 4

Susan Berk-Seligson, THE BILINGUAL COURTROOM (2002) 8

Alicia B. Edwards, THE PRACTICE OF COURT INTERPRETING (1995) 8

TABLE OF AUTHORITIES
(continued)

Page(s)

FUNK & WAGNALLS NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (comprehensive ed. 1996) 5

Roseann Dueñas González, Victoria F. Vásquez, & Holly Mikkelson, FUNDAMENTALS OF COURT INTERPRETATION (1991) 8, 9

5 GUIDE TO JUDICIARY POLICY: COURT INTERPRETING § 550.20.10(a) 11, 12

H.R. Rep. No. 95-1687 (1978) 16

Lawyers for Civil Justice, *et al.*, *Litigation Cost Survey of Major Companies* (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf 20, 22

LONGMAN NEW UNIVERSAL DICTIONARY (1982) 3

THE OXFORD ENGLISH DICTIONARY 4

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) 3, 4

REPLY BRIEF FOR PETITIONER

Congress authorized taxation of the "compensation of interpreters," 28 U.S.C. § 1920(6), in the Court Interpreters Act, a piece of legislation focused on employing "interpreters" to provide simultaneous or consecutive interpretation of spoken federal court proceedings. The statute's use of the word "interpreters" to reference spoken proceedings is in keeping with the usage in the vast majority of dictionaries and extensive professional, regulatory, and statutory materials. These materials make clear that the word "interpreters" refers to those who transfer meaning in the course of spoken communication, and distinguish the role of document translators as separate from interpreters. The conclusion that subsection 1920(6) allows cost recovery for the services of interpreters of spoken proceedings, but not for those of translators of written texts, is thus required both to construe the statute in an internally consistent manner and to reflect the common understanding of the words used.

Kan Pacific places unusual emphasis on policy arguments, discussing them at length even before addressing the Court Interpreters Act as a whole. Resp. Br. 19-34. This priority of policy over text is, of course, generally inappropriate. *See, e.g., Pac. Operators Offshore, LLC v. Valladolid*, __ U.S. __, slip op. at 12 (Jan. 11, 2012) (noting that "policy concerns cannot justify an interpretation of [a statute] that is inconsistent with [its] text"). But it is particularly unwarranted in this context given the Court's expressed reluctance to predicate departures from the American Rule on policy grounds because, while the rule "has been criticized," "[i]t is deeply

rooted in our history and in congressional policy." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 270-71 (1975); *accord Kansas v. Colorado*, 556 U.S. 98, 103 (2009) (adhering to policy of American Rule even where the "policy choice is debatable").

In any event, Kan Pacific's policy arguments are unpersuasive. They rest on greatly overstated line-drawing problems that cannot in any event justify wholesale rejection of the distinction between interpretation and translation, and also on the incorrect view that the importance of a particular litigation expense counts in favor of taxing it as costs. To the contrary, the ordinary policies relevant to costs questions, such as the potential size and deterrent effect of taxing those amounts, counsel in favor of construing subsection 1920(6) in conformity with its plain meaning, as do unique considerations of international comity.

I. TRANSLATORS OF WRITTEN TEXTS ARE NOT "INTERPRETERS"

A. The Text and Structure of the Court Interpreters Act Exclude Document Translation

Congress enacted the Court Interpreters Act in 1978 primarily to make foreign-language interpreters available to provide simultaneous and consecutive interpretation of spoken words in the context of certain federal judicial proceedings. Given this clear, overarching purpose and the statute's substantive provisions that implement it, there can be little doubt that the word "interpreters" as it appears in the Act's title and throughout its text refers to persons who

perform oral interpretation in the course of ongoing, spoken proceedings.

This understanding of the word "interpreters" as used in the statute is supported by a wide variety of authorities that give meaning to that term. These sources show that an interpreter's role does not encompass written translation. Opening Br. 12-25. Kan Pacific deals with these authorities through an exercise in selective perception, relying on a partial reading of one dictionary definition, wishful constructions of a few others, and by dismissing or ignoring many more.

1. As demonstrated in petitioner's opening brief, at 13-16, the overwhelming consensus view of general, legal, and specialized dictionaries is that an "interpreter" is "[o]ne who translates orally for people speaking in different languages." LONGMAN NEW UNIVERSAL DICTIONARY 517 (1982). This meaning has been clear for more than a century. *E.g.*, William C. Anderson, A DICTIONARY OF LAW 565 (1889).

Kan Pacific's argument proceeds by arbitrarily discounting or ignoring virtually all sources other than its single preferred dictionary, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976), from which Kan Pacific selectively excerpts a partial quote defining an "interpreter" as "one who translates." Resp. Br. 12. Kan Pacific dismisses other Webster's dictionaries as "abridged versions of" WEBSTER'S THIRD, Resp. Br. 15, ignoring the fact that the categorical exclusion of written translation in Webster's own abridgments underscores what is plain from the complete definition that appears in WEBSTER'S THIRD, that Kan Pacific's meaning is, at best, uncommon and disfavored.

Kan Pacific rejects older dictionaries as "out of date," *id.*, neglecting the fact that they establish the longstanding and settled nature of the usage. It dismisses as "obscure," *id.*, dictionaries that are in fact specialized references dedicated to particularly relevant contexts such as linguistics, business, and law. It dismisses still other dictionaries—including the fourth edition of BLACK'S LAW DICTIONARY, which was current when the statute was enacted—for using a still narrower definition restricted to "person[s] sworn at a trial" who interpret orally, *id.* at 15 & n.6 (emphasis omitted), neglecting the fact that an even more constrained definition all the more strongly reinforces the exclusion of document translation. And it entirely ignores still other dictionaries, THE AMERICAN HERITAGE DICTIONARY and THE OXFORD ENGLISH DICTIONARY, which categorically exclude document translation, or characterize it as an obsolete usage. Opening Br. 14.

At the end of the day, not even WEBSTER'S THIRD supports Kan Pacific's position, since it defines "interpreter" as "one that translates; *esp.* a person who translates orally for parties conversing in different tongues." WEBSTER'S THIRD 1182. As discussed in the opening brief at 15 n.5, the SUPPLEMENT to WEBSTER'S THIRD makes clear that dictionary's practice of using "*esp.*" to "connote[] the most common meaning subsumed in the more general preceding definition."[1] Kan Pacific argues

---

[1] Even if WEBSTER'S THIRD were fairly read to equate interpretation with translation, this Court has specifically warned against accepting a definition found in a single dictionary (WEBSTER'S THIRD, as it happens) when its "suggested meaning contradicts virtually all other[]"

that "'[e]specially' does not mean 'only,'" Resp. Br. 13, but this Court has made clear that the "most common meaning" of a statutory term ordinarily controls for purposes of statutory interpretation. *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 301 (1989); *accord, e.g.*, *United States v. Ramsey*, 431 U.S. 606, 612 n.8 (1977) (adopting "the most common usage of the [statutory] word"); *United States v. Van Auken*, 96 U.S. 366, 368 (1877) (adopting "the sense in which [a statutory term] is most commonly used").[2]

As a result, this Court frequently construes statutory terms coextensively with parts of definitions prefaced by "*esp.*" For instance, in *Sullivan v. Stroop*, 496 U.S. 478 (1990), the Court construed the phrase "child support" to mean "legally compulsory payments made by parents," *id.* at 482, a meaning coextensive with the "*esp.*" clause of a definition it cited in support: "money paid for the care of *one*'s minor child, *especially payments to a*

(continued...)

dictionaries. *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 226 (1994).

[2] Kan Pacific's *amici*, but not Kan Pacific itself, claim that FUNK & WAGNALLS NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (comprehensive ed. 1996), defines "interpreter" as "one who interprets or translates." Br. of Chicago Area Translators, *et al.* 12. That is not so, as the actual definition is "one who interprets or translates; *specifically, one who serves as oral translator between people speaking different languages.*" FUNK & WAGNALLS at 665 (emphasis added). The *amici* also cite several dictionaries listing "the two words as synonyms," Br. 12, even though dictionaries list as "synonyms" "pairs or groups of words similar in meaning or associated in use, [which] has even been extended in some instances to include the discussion in a single article of contrasted terms." FUNK & WAGNALLS at xvii.

divorced spouse or a guardian under a decree of divorce." *Id.* (internal quotation marks omitted). *See also, e.g., Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) (construing "impartiality" coextensively with "*esp.*" clause of dictionary cited in support); *Sossamon v. Texas*, 131 S. Ct. 1651, 1660 (2011) (finding "plausible," but not definitively reaching, the argument that the meaning of the word "relief" should be restricted to that in an "*esp.*" clause).

Kan Pacific cites *Smith v. United States*, 508 U.S. 223 (1993), which held that "use" of a gun in 18 U.S.C. § 924(c)(1) included exchanging the gun for drugs, apparently to show that broad meanings should be preferred over more common narrower ones. However, *Smith* did not announce any preference for broader over narrower meanings, but rather found that the broader meaning of "use" at issue in that case was consistent with its "ordinary or natural meaning." 508 U.S. at 228. This Court adopted the narrower of two proposed meanings of the same word in the same provision in *Watson v. United States*, 552 U.S. 74, 83 (2007). More generally, the Court routinely adopts narrower meanings over broader ones where doing so best captures the most common meaning, as it did, for instance, in *Watson*, *Sullivan*, and *Mallard*.

2. Kan Pacific does not dispute that professional literature is an important tool in construing the meaning of the word "interpreters." Opening Br. 16-17; *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 372 (1986). However, it simply ignores most of the strong evidence found in these materials, which distinguishes between interpreting, as involving the

facilitation of live, oral communication, and translating, which produces a written product in a different language. Opening Br. 17-23. *But see* Resp. Br. 16 (disputing the meaning of one source). Additionally, the ABA's proposed Standards for Language Access in Courts, prepared "to assist courts in designing, implementing, and enforcing a comprehensive system of language access services," define "interpreter" as one "who is fluent in both English and another language, who listens to a communication in one language and orally converts it into another language while retaining the same meaning." Proposed Standards at 1, 7 (Feb. 2012), *available at* http://www.courts.ca.gov/documents/Stds_for_Language_Access__FINAL__12-13-2011_w_disclaimer_.pdf.

Rather than dispute the clear distinction drawn in the professional literature, Kan Pacific purports to rely on that literature in contending that such a distinction cannot practicably be applied because there are a number of tasks that cannot be placed on either side of the line. Resp. Br. 20-23. Specifically, it identifies four particular tasks that it claims are "difficult if not impossible to characterize . . . as either 'interpretation' or 'translation' under Taniguchi's strict dichotomy." *Id.* at 22.

Even if there were ambiguous cases at the margin of interpreting and translating, that would be no basis for ignoring the distinction between the two words that is indisputable and clear in the vast majority of situations. For instance, the Court in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), construing the phrase "appropriate equitable relief" in section 502(a)(3)(B) of ERISA,

held that difficulties classifying some remedies as legal or equitable did not obviate the need to make such distinctions, given that, "[l]ike it or not, . . . that classification and distinction has been specified by the statute." *Id.* at 217. *See also, e.g.*, *Hartranft v. du Pont*, 118 U.S. 223, 227 (1886) (distinguishing large from small boats under 52 Rev. Stat. 4426, which addressed certain "small craft," notwithstanding the "difficult[y of] draw[ing] th[at] line" as to some boats of intermediate size).

In any event, it is not difficult to determine whether any of the four activities count as interpretation. "Interpretation almost universally refers to the transfer of meaning from one language into another for the purpose of oral communication between two persons who do not share the same language." Roseann Dueñas González, Victoria F. Vásquez, & Holly Mikkelson, FUNDAMENTALS OF COURT INTERPRETATION 33-34 (1991) (emphases omitted). Each of Kan Pacific's examples falls clearly inside or outside that meaning.

Kan Pacific's first example, sight interpretation, is clearly interpreting. It involves the "translat[ion] *aloud* into another language [of] a text that is physically present in [one's] hand," Alicia B. Edwards, THE PRACTICE OF COURT INTERPRETING 105 (1995) (emphasis added), and is generally "carried out in the course of formal judicial procedure and is recorded by the court reporter," Susan Berk-Seligson, THE BILINGUAL COURTROOM 39 (2002).

Kan Pacific's second purported borderline case is transcription, the production of a written transcript of a sound recording. Transcription is not interpreting, because, unlike sight interpretation, it

does *not* occur in the course of spoken communication between persons in real time. To the contrary, it is a solitary activity involving the luxury of "multiple playbacks of the tape" and the leisure to consult extrinsic linguistic sources if desired. González, Vásquez, & Mikkelson, *supra*, at 440-41.

Kan Pacific's third and fourth examples, the comparison of written documents and the translation of written documents, likewise are plainly not interpretation under the ordinary meaning involving live, spoken communication.

3. Petitioner showed that a number of government agencies have similarly defined interpreting as limited to the context of spoken communication in various contexts. Opening Br. 23-25. Kan Pacific offers no response whatsoever to this showing.

4. Instead, Kan Pacific cites several purportedly conflicting uses in newspapers and other sources. Resp. Br. 16-17. None of them are persuasive instances of a contrary usage.

At the outset, there is a basic difference between the materials discussed above and those referenced by Kan Pacific. The materials cited by Mr. Taniguchi specifically address the meaning of the term "interpreter," and expressly provide that it does not apply to written translators. None of the various materials Kan Pacific cites as counter-examples purport to specify the meaning of the word. Rather, they are simply documents that use the word "interpreter," often in passing, in contexts unrelated to defining the term. It would hardly be surprising if Kan Pacific could find a few examples of imprecise

usages in the massive databases of Westlaw, LEXIS, and Google.

But, in fact, the newspaper articles and district court opinions cited by Kan Pacific merely recite that an interpreter translated a document, or indicate that one might. The same is true of the three State statutes it cites. *See* CAL. GOV'T CODE § 26806(a) (directing the clerk in large counties to hire interpreters who are also able to translate); FLA. STAT. ANN. § 90.606 (providing that an interpreter who translates must take an oath to do so faithfully); MICH. COMP. LAWS ANN. § 775.19 (addressing in-court sight interpretation). Some of these sources affirmatively distinguish between spoken interpretation and written translation.[3] And all of them are entirely consistent with viewing interpreting as spoken. As noted in the opening brief at 20, bilingual interpreters may, if they are able, sometimes also translate documents, but when they do so, they are not interpreting. Occasional instances documenting interpreters who translate something are therefore to be expected.

Kan Pacific's references to several decisions of this Court, Resp. Br. 18 n.9, passages of the legislative history, *id.* at 44, and three statutes, *id.* at 49 n.21, arguably using the broad meaning of the word "translate" are also unavailing. As the opening brief showed, while "interpretation" does not include

---

[3] *See United States v. Prado-Cervantez*, 2011 WL 4691934, at *3 (D. Kan. Oct. 6, 2011) (Resp. Br. 17 n.8) (distinguishing between "interpret[ing]" and "translat[ing] documents"); *see also* FLA. STAT. ANN. § 90.606 (Resp. Br. 18 n.10) (titled "Interpreters and translators," and providing that one "who serves in the role of interpreter or translator in any action or proceeding is subject to all the provisions of this chapter relating to witnesses").

written translation, the word "translation" may be used narrowly to reference preparation of texts in a different language, or more broadly to include any inter-language transfer of meaning. Opening Br. 18. Thus, Kan Pacific's references to a handful of generic uses of "translate" do not suggest that the word "interpreter" carries a comparably broad meaning.

Kan Pacific also cites several notices of forthcoming interpreting examinations issued by the Administrative Office during the 1980s and early 1990s. Resp. Br. 39-41. But these examination postings do not say that translation is part of interpretation. They merely note that interpreters sometimes translate. Moreover, other authority makes clear that the examinations in question were designed to ensure that interpreters could accurately "render what is *said* in the court as it was said." *Seltzer v. Foley*, 502 F. Supp. 600, 603 (S.D.N.Y. 1980) (summarizing AO official's testimony about the design of the examination) (emphasis added). Thus, at the time of these early examinations, as now, the Office's examinations "d[id] not test for translation skills." 5 GUIDE TO JUDICIARY POLICY: COURT INTERPRETING § 550.20.10(a).

In any event, these brief, ministerial documents do not purport to represent the Office's official views regarding implementation of the statute, as does its formal guidance document posted on its web site. *See* Opening Br. 23. The latter document explicitly provides that translation is excluded. *See* 5 GUIDE § 550.20.10(a) ("The Court Interpreters Act does not address written translation requirements . . . ."); *id.* § 550.20.40 ("Translations and transcriptions are not within the scope of the Court Interpreters Act . . . .").

The most recent notice cited by Kan Pacific (and we are aware of no later one) was issued in 1994. There is no dispute that the Office's current position, as set out in the GUIDE, is that written translation is excluded, and that would be the relevant source to consider even if the Office had previously held a different view. *See, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (noting that an agency "is not estopped from changing a view [it] believes to have been grounded upon a mistaken legal interpretation").

Finally, Kan Pacific asserts that "no one would refer to someone who orally translates into English the speeches of foreign leaders as they are being made as 'an English-language "interpreter" of the speeches.'" Resp. Br. 18-19 (emphasis omitted). This is simply incorrect. That usage is within the core meaning of "interpreter" under any definition.

5. The Court Interpreters Act is an integrated statute, and Kan Pacific's effort to sever its sections into "a series of unrelated and isolated provisions," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995), is misplaced. *See* Resp. Br. 35-38. Section 2 sets out various rules addressing the certification and use of "interpreters," and section 7 provides for the taxation of their compensation. Moreover, the two sections are interrelated. Section 2 contains provisions allocating the costs of interpreter expenses within the program embodied by section 1827. Act § 2 (codifying 28 U.S.C. §§ 1827(g), (h), 1828 (c), (d), Resp. Appx. 4a-7a). Section 7, Resp. Appx. 11a, addresses the taxation of interpreter expenses more broadly in cases involving interpreters, including those occurring under section 2. There is, in short, no

textual or logical basis to assign different meanings to the central unifying term of the statute—"interpreters"—in its different provisions.

Kan Pacific's attempt to assign different meanings to the word "interpreter" in sections 2 and 7 contravenes the "normal rule of statutory construction" presuming that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson*, 513 U.S. at 570; *accord, e.g., Barnhart v. Walton*, 535 U.S. 212, 221 (2002). Apart from that general governing principle, it is also illogical by its own terms.

Kan Pacific argues that a different meaning is suggested by the use in section 2 (codifying 28 U.S.C. §§ 1827-28) of the phrase "interpreters in courts of the United States," while section 7 (codifying 28 U.S.C. § 1920(6)) simply refers to "interpreters." Resp. Br. 37. But many provisions of section 2, including the one requiring the use of interpreters in cases brought by the government, simply use the word "interpreters," unaccompanied by the phrase "in courts of the United States." Act § 2 (codifying 28 U.S.C. § 1827(d)), Resp. Appx. 2a. And section 1920 is a list of costs eligible for assessment in "any court of the United States."[4]

Kan Pacific's assertion that section 2, unlike section 7, "applies only in cases 'initiated by the United States,'" is both incorrect and irrelevant.

---

[4] Similarly, Congress codified section 2 in the chapter of the Code addressing witnesses because it deals primarily with the use of interpreters, and section 7 in the chapter addressing fees and costs, Resp. Br. 38, because it is a costs provision. Kan Pacific offers no explanation why this calls for a different meaning of the same word in the two sections.

Some provisions of section 2 apply in cases not initiated by the United States. *See, e.g.*, Act § 2 (codifying 28 U.S.C. § 1827(e)(2), Resp. Appx. 3a) (addressing duty of Administrative Office to facilitate the private retention of interpreters "[i]n any criminal or civil action in a United States district court"). And the fact that section 7 applies in some cases where parts of section 2 do not offers no basis to assign the word "interpreters" different meanings in the two provisions.

6. Although Kan Pacific does not contend that interpretation services under sections 1827 and 1828 include document translation, it says that it is not "clear" that they do not. Resp. Br. 39. In fact, that limitation is abundantly clear.

Section 2 of the Court Interpreters Act specifies that "[t]he interpretation provided by certified interpreters" under section 1827 must be performed in one of three modes (consecutive, simultaneous, or summary), none of which are relevant to the translation of documents.[5] Resp. Appx. 5a (codifying § 1827(k)). Section 1828 similarly specifies the "simultaneous" mode for the interpretation services it addresses. Resp. Appx. 6a (codifying § 1828(a)). Moreover, as Kan Pacific itself acknowledges, Resp. Br. 38, those sections occur in Chapter 119, which addresses "[w]itnesses," rather than Chapter 115, which addresses "[d]ocumentary" evidence.

---

[5] The reference to the summary mode was removed from subsection (k) in 1988; it now requires that the interpretation be carried out in either the simultaneous or consecutive mode. Opening Br. 6 n.4.

B. The Consistent Usage of "Interpreters" Throughout the United States Code, and in Related Rules, Confirms the Limited Meaning of That Term

1. Treating "interpreters" and "translators" as synonymous would also be inconsistent with a longstanding distinction made in many other statutes. Opening Br. 32-33.

Kan Pacific puzzlingly asserts that Mr. Taniguchi and his *amici* identified "seven" such provisions of the Code, which it purports to divide into three categories and then proceeds to discount through a variety of *ipse dixit* pronouncements, concluding "[s]o much for the use of 'interpreters' in other statutes."[6] Resp. Br. 47-48. In fact, petitioner and *amici* collected more than twice as many statutes as Kan Pacific acknowledges. Opening Br. 30-32; Brief of *Amicus* NAJIT 13-14.

By entirely ignoring more than half of the relevant statutory authority, Kan Pacific is able, for example, to disregard 15 U.S.C. § 649, which expressly distinguishes between "translat[ing] documents" and "interpret[ing] conversations." It likewise avoids dealing with 10 U.S.C. § 1596b(f), which makes the same distinction between "translation" and "interpretation of communication in a foreign language" in defining the phrase "linguistic services."

[6] Kan Pacific's distinction between interpreters and translators as "job titles"—which it admits distinguish between the written and oral modes—and as activities, Resp. Br. 48, is entirely imagined. The same literature that distinguishes the two professions also makes abundantly clear that the associated activities are correspondingly distinct. Opening Br. 16-23; Br. of *Amici Curiae* Interpreting and Translation Professors 11-12, 18-25.

More generally, Kan Pacific thus avoids ever coming to grips with the fact, apparent even from a cursory review of the statutory language excerpted in the briefs, that numerous federal statutes reference interpretation and translation in ways that make clear they are non-redundant terms for distinct activities.

2. Rule 43(d) of the Federal Rules of Civil Procedure, like subsection 1920(6), authorizes the taxation of the "compensation" of certain "interpreter[s]" "as costs," and excludes document translation. Opening Br. 29-30. Kan Pacific begs the question by drawing the purported distinction that interpreters under Rule 43(d) act in the course of live testimony. Resp. Br. 45. That this precursor to subsection 1920(6) excluded document translators reinforces the corresponding limitation of the same word "interpreters" in subsection 1920(6).

II. ANY AMBIGUITY SHOULD BE RESOLVED IN FAVOR OF PETITIONER'S POSITION

A. The Legislative History Confirms the Limitation to Spoken Interpretation

The legislative history strongly reinforces the plain meaning of the word "interpreters." The original sponsor made clear that the statute was intended to address "oral translation." *The Bilingual Courts Act: Hearings Before the Subcomm. on Improvements on Judicial Machinery of the S. Comm. on the Judiciary*, 93d Cong. 17 (1973). As such, it was understood to apply to the "interpretation of proceedings." H.R. Rep. No. 95-1687, at 3 (1978). Kan Pacific responds that these and similar passages "do[] not show that the law that was ultimately enacted was meant to exclude written translation." Resp. Br. 42. But the

absence of any contrary suggestion makes it unreasonable to suppose that the essential animating purpose of the statute changed before enactment, leaving no trace in the documentary record.

The legislative history also includes a number of materials showing that the word "interpreter" was understood to refer to oral communication. Opening Br. 34. Kan Pacific's observation that these provisions did not specifically allude to "the provision of the Court Interpreters Act that amended the cost statute," Resp. Br. 42, is irrelevant. Most of the cited materials and testimony were presented to Congress not in connection with *any* particular provision of the bill, but rather to educate Congress about interpreters and their role as a general matter. These materials are therefore of general relevance throughout the statute.

A section of the bill specifically addressed document translation, but was deleted from the final statute. Opening Br. 34-35. Kan Pacific responds that "[t]he deleted provision *required* translation that would not otherwise have been undertaken," unlike the costs provision, which allocates preexisting translation costs. Resp. Br. 43. The provision is nonetheless highly relevant for several reasons. First, the deleted provision used the word "translation," a word that occurs nowhere in the Court Interpreters Act as ultimately passed, to refer to the translation of written materials. This confirms that, consistent with ordinary congressional practice, the drafters of the law used the word "translation," rather than "interpretation," when they intended to address written documents. Moreover, the legislative history relating to the provision specifically notes

both the significant costs associated with document translation and the burdens attendant to the assignment of translation expenses to parties. Opening Br. 35. Both of these concerns are also relevant in the context of costs.

Finally, Kan Pacific admits that there is not a hint in the lengthy legislative history (apart from the deleted provision discussed in the preceding paragraph) that anything in the statute was viewed as embracing the translation of written documents. Resp. Br. 43.

B. Subsection 1920(6) Should Be Narrowly Construed as a Statute in Derogation of the Common Law

Subsection 1920(6) should be read narrowly as an enactment in derogation of the common law, which did not authorize costs awards. Opening Br. 36-37. Kan Pacific cites *Johnson v. South Pacific Co.*, 196 U.S. 1 (1904), apparently to support its otherwise unsupported claim that that an original "statute's successor is not subject to the interpretive canon." Resp. Br. 50. *Johnson* construed a statute requiring railroad cars to be "equipped with couplers coupling [the cars together] automatically by impact," and abrogating common-law assumption-of-risk for employees injured by non-compliant cars. 196 U.S. at 13-14. The issue before the Court was whether this statute should be read narrowly so as not to apply (and thus not to abrogate the common law rule) where the cars possessed automatic couplers but they were incompatible with each other, and hence required manual coupling by railroad employees. 196 U.S. at 16-17. The Court ruled the narrow-construction canon inapplicable not because any

successor statute was involved, but because the provision departing from the common law assumption-of-risk doctrine was entirely clear and appeared in a different provision of the statute. Id. at 17. *Johnson* thus does not support Kan Pacific's argument. In any event, the provision at issue in this case allowing taxation of interpreter costs is not a successor statute either, since it is the first enactment allowing taxation of interpreter costs.

III. CONGRESS'S DECISION TO ALLOW COSTS FOR INTERPRETERS BUT NOT TRANSLATORS IS SENSIBLE AS A MATTER OF POLICY

A. Good Reasons Support Treating Interpreters Differently From Translators

1. A reasonable policymaker could determine "that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit" by the imposition upon the loser of large costs. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). Kan Pacific concedes that this consideration motivated the exclusion of attorneys fees from costs, Resp. Br. 24-25, but does not explain why this reasoning does not apply to other potentially large costs elements.

Kan Pacific disputes that document translation creates a risk of large costs awards. Resp. Br. 25. Yet translation expenses in several cases have involved hundreds of thousands, and, in one case, more than a million, dollars. *See, e.g., Ortho-McNeil Pharm., Inc. v. Mylan Labs. Inc.*, 569 F.3d 1353, 1355-56 (Fed. Cir. 2009) (more than $1,000,000); *In re Puerto Rico Elec. Power Auth.*, 687 F.2d 501, 509-10 (1st Cir. 1982) (approximately $250,000); *Gabriel*

Techs. Corp. v. Qualcomm Inc., 2010 WL 3718848, at *12 (S.D. Cal. Sept. 20, 2010) (estimate of $182,400); *Trading Techs. Int'l v. eSpeed, Inc.*, 750 F. Supp. 2d 962, 983 (N.D. Ill. 2010) ($109,614). Other recent cases involve large translation expenses.[7]

Kan Pacific notes that the document translation costs in other cases can be "quite modest." Resp. Br. 27. But as globalization proceeds and transnational litigation becomes ever more commonplace, the size and frequency of large translation awards are likely to increase. *See, e.g., Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994) (noting that "one can expect further globalization of commerce," with attendant increases in cross-borders litigation). Major cases commonly involve millions of pages of discovery documents. *See* Lawyers for Civil Justice, *et al., Litigation Cost Survey of Major Companies* 16 (2010) [hereinafter, *Litigation Cost Survey*].[8] As transnational litigation continues to grow, very large translation expenses are likely to become increasingly routine.

Moreover, the "broad scope" of discovery "presents unscrupulous litigants with the means to manipulate the process to their advantage." *Baez-Eliza v. Instituto Psicoterapeutico*, 275 F.R.D. 65, 70 (D.P.R.

---

[7] *See also, e.g., Extra Equipamentos E Exportação Ltda. v. Case Corp.*, 541 F.3d 719, 727 (7th Cir. 2008) ("almost $76,000"); *Dong Ah Tire & Rubber Co. v. Glasforms, Inc.*, 2010 WL 1691869, at *7 (N.D. Cal. Apr. 23, 2010) ($52,998.45); *Osorio v. Dole Food Co.*, 2010 WL 3212065, at *11 (S.D. Fla. July 7, 2010) ($25,885.39); *Hynix Semiconductor Inc. v. Rambus Inc.*, 697 F. Supp. 2d 1139, 1155 (N.D. Cal. 2010) ($24,671.57).

[8] *Available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.

2011). Kan Pacific's reading of the statute would permit the strategic use of translation services, with their attendant costs, to deter limited-means immigrants or non-English speakers from vindicating rights in court.

The district court's discretion under Rule 54(d), Resp. Br. 27-29, offers little protection. Examining the necessity and reasonableness of document translation involving potentially many thousands of discovery documents would be quite difficult and, if done conscientiously, would impose substantial burdens on the district courts. The need for interpretation, by contrast, is usually quite apparent based on occurrences of events requiring an interpreter's services in order to be understood.

Contrary to Kan Pacific's assurance that there has not been "any evident difficulty" making such necessity determinations, Resp. Br. 30, translation necessity determinations sometimes "do[] not appear possible . . . within a reasonable time and by expenditure of a reasonable amount of judicial resources," due to volume, lack of clear standards, and difficulties with parties' documentation. *E. & J. Gallo Winery v. Andina Licores S.A.*, 2007 WL 1589546, at *2 (E.D. Cal. June 1, 2007).

Moreover, because the statute supplies no uniform textual basis to set the scope of such a limitation, such review has given rise to inconsistent standards and disparate treatment. *Compare, e.g., Hynix Semiconductor Inc.*, 697 F. Supp. 2d at 1153 (finding translation costs incurred to test accuracy of adversary's translation necessary), *with Oetiker v. Jurid Werke GmbH*, 104 F.R.D. 389, 393 (D.D.C. 1982) (finding such costs unnecessary). The federal

costs regime was designed to eliminate precisely such divergent results in costs awards. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761 (1980) ("Above all, Congress sought to standardize the treatment of costs in federal courts, to make them uniform—make the law explicit and definite." (internal quotes omitted)). And the reasonable necessity standard does not consider the resources available to the losing party and hence provides little protection to limited-means litigants.

Kan Pacific also claims that excluding document translation from subsection 1920(6) will not "inevitably disadvantage" immigrants and non-English speakers because they would lose the ability to recover their own document translation costs, which they might incur preparing their foreign-language documents for submission to the court. Resp. Br. 31-32. But an adverse impact need not "inevitably" occur in every case to warrant policy consideration. And Kan Pacific does not dispute that these groups would be harmed *disproportionately* by the rule it advocates. In major cases that go to trial, the ratio of admitted exhibits (which those possessing non-English documents might translate) to documents produced in discovery (which their adversaries would translate) is extremely small, perhaps less than one in a thousand. *See Litigation Cost Survey* at 16. Thus, the initial expenses of document translation fall disproportionately on the party who receives foreign-language documents in discovery and the burden of their taxation disadvantages the party who produces them. Moreover, a party of limited means has substantial control over its own translation expenses, but it has no control over the translation expenses incurred by

a wealthier adversary. The regime advocated by Kan Pacific thus exposes limited-means parties to substantially greater potential costs liability than it offers in return if they prevail.

2. A number of foreign sovereigns have expressed serious concern regarding the costs and burdens associated with imposing United States document discovery upon their nationals. Adding a potential obligation to pay the costs of translating produced discovery documents increases that burden, and directly implicates concerns that a reasonable policymaker could choose to allay. Opening Br. 40-41.

Kan Pacific objects that there is "no evidence in the legislative record" that Congress was motivated by this concern. Resp. Br. 33. But there is no evidence that Congress was motivated by *any* of Kan Pacific's own policy considerations. Congress had no occasion to address these policy issues because there was never any thought or suggestion of including document translation in subsection 1920(6).

Kan Pacific observes that the French blocking statute applies to spoken as well as written discovery. Resp. Br. 33. But it does not dispute that document discovery is the core concern expressed by foreign nations, Opening Br. 40, and thus warrants greater comity consideration. Its claim that comity concerns in this area are limited to "prescriptive jurisdiction" is just wrong, as the very case it cites shows. *See F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (listing prescriptive jurisdiction as but one example of the generally applicable rule). And it claims that translation awards "hardly rise[] to the level of unreasonable

interference." Resp. Br. 34. But they are additive upon preexisting discovery expenses, as to which these nations have *already* expressed concern.

B. Kan Pacific's Contrary Policy Arguments Are Baseless

Other than its mistaken supposition that there are vague, borderline cases between interpreting and translation, Kan Pacific merely argues that translation "is no less important" than interpretation. Resp. Br. 20. While that may sometimes be true, importance is not the determinant for inclusion in the costs statute. Many extremely important litigation expenses are not taxable under section 1920. *See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 438-45 (1987) (costs of expert witnesses); *Alyeska Pipeline*, 421 U.S. at 270-71 (attorneys fees).

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

DOUGLAS F. CUSHNIE
P.O. Box 500949
Saipan, MP 96950
(670) 234-6843

DONALD B. AYER
Counsel of Record
MICHAEL S. FRIED
CHRISTOPHER J. SMITH
JANE E. HOLMAN
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
dbayer@jonesday.com
(202) 879-3939

February 3, 2012

Counsel for Petitioner

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-1472

In The
Supreme Court of the United States

KOUICHI TANIGUCHI, PETITIONER,

v.

KAN PACIFIC SAIPAN, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CHICAGO AREA TRANSLATORS AND INTERPRETERS ASSOCIATION, COLORADO TRANSLATORS ASSOCIATION, AND EL PASO INTERPRETERS AND TRANSLATORS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

DEANNE E. MAYNARD
BRIAN R. MATSUI
Counsel of Record
MARC A. HEARRON
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-8784
bmatsui@mofo.com

Counsel for Amici Curiae

JANUARY 18, 2012

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 4

COSTS FOR "COMPENSATION OF INTERPRETERS" IN 28 U.S.C. § 1920 INCLUDES COSTS FOR TRANSLATION OF WRITTEN DOCUMENTS 4

A. Interpreters And Translators Perform Closely Related Work, Particularly In Litigation 5

1. Translation of written and spoken language requires related skills 5

2. Legal translation is an act of interpretation 9

B. The Text Of Section 1920 Is Not So Narrow As To Exclude The Translation Of Written Documents 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Asgrow Seed Co. v. Winterboer, 513 U.S. 179 (1995) 11

Hamilton v. Lanning, 130 S. Ct. 2464 (2010) 11

McNeill v. United States, 131 S. Ct. 2218 (2011) 13

Ransom v. FIA Card Services, N.A., 131 S. Ct. 716 (2011) 11

STATUTES

28 U.S.C.:

§ 1920 ..... 4, 11, 13

§ 1920(2) (1978) 13

§ 1920(3) (1978) 13

§ 1920(4) (1978) 13

§ 1920(6) 4, 11, 13

OTHER AUTHORITIES

About the American Translators Association, Am. Translators Ass'n, http://www.atanet.org/aboutus/history.php 7

American Encyclopedic Dictionary (1987) 12

Byron W. Daynes, *The Court Interpreter—An AJS Study*, 51 Judicature 135 (1967) 7

Cambridge Dictionary of American English (2000) 12

TABLE OF AUTHORITIES—Continued

Page

Eleanor Wong, *In the Space Between Words and Meaning: Reflections From Translating Lao Laws to English*, Sing. J. Legal Stud. 439 (2006) 6, 9

Funk & Wagnalls New Int'l Dictionary (Comprehensive ed. 1996) 12

H.R. Rep. No. 95-1687 (1978) 13

Heinemann English Dictionary (1979) 12

Holly Mikkelson, Introduction to Court Interpreting (2000) 8

Hon. Lynn W. Davis & William E. Hewitt, *Lessons in Administering Justice: What Judges Need to Know About the Requirements, Role, and Professional Responsibilities of the Court Interpreter*, Harv. Latino L. Rev. 121 (1994) 7, 8

Ichiro Kitamura, *Problems of the Translation of Law in Japan*, Victoria U. Wellington L. Rev. 143, Monograph 7 (1993) 10

Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993) 9

New Merriam-Webster Dictionary (1989) 12

North Carolina Administrative Office of the Courts, *Interpreting in the Courts: The AOC's Guidelines*, 7 N.C. St. B.J. 24 (2002) 9

Peter W. Schroth, *Legal Translation*, 34 Am. J. Comp. L. Supp. 47 (1986) 6

TABLE OF AUTHORITIES—Continued

Page

Rose Kennedy, *Much Ado About Noting: Problems in the Legal Translation Industry*, 14 Temp. Int'l & Comp. L.J. 423 (2000) 6, 9, 10

S. Rep. No. 95-569 (1977) 14

Webster's New American Dictionary (1995).....12

Webster's Third New Int'l Dictionary (1993) 12

BRIEF FOR CHICAGO AREA TRANSLATORS AND INTERPRETERS ASSOCIATION, COLORADO TRANSLATORS ASSOCIATION, AND EL PASO INTERPRETERS AND TRANSLATORS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

The Chicago Area Translators and Interpreters Association, Colorado Translators Association, and El Paso Interpreters and Translators Association respectfully submit this brief as amici curiae in support of respondent.[1]

INTEREST OF AMICI CURIAE

The Chicago Area Translators and Interpreters Association (CHICATA) is an independent professional association of individual translators and interpreters. Established in 1987, CHICATA has grown to over 170 independent, freelance, and in-house translators and interpreters working in 50 languages and over 120 language combinations. CHICATA promotes the recognition of translation and interpretation as professions, improves standards, professional ethics, practices, and

---

[1] Letters providing blanket consent to the filing of amicus briefs have been filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

competence among its members, and provides a regular forum for translators and interpreters to exchange ideas and experiences.

The Colorado Translators Association (CTA) is a not-for-profit professional organization for Colorado-based translators and interpreters that offers assistance to its members and to corporations and individuals seeking translation and interpretation services. CTA provides a forum for the exchange of information, training, and assistance in all areas related to the profession of translation and interpretation. CTA establishes important contacts between business, government, and industry, as well as public relations to inform and educate the public. CTA members represent over 25 different language pairs. Specialty areas vary widely and include, for example, computer hardware and software, telecommunications, law, health, medicine and medical instrumentation, finance, automotive, mining and petroleum, geography, natural science, poetry, and cross-cultural consulting.

The El Paso Interpreters and Translators Association (EPITA) is a professional association of interpreters and translators that was founded on February 9, 1984. EPITA's members frequently work with institutions of higher learning, government agencies, business in general, and the legal and medical professions. The goals of EPITA are to advocate for the advancement, protection, and benefit of its members. EPITA seeks to unite interpreters and translators in El Paso and surrounding areas in an

effort to upgrade the profession, to meet the increasing demand for more qualified interpreters and translators, and to promote programs designed to educate, train, and certify interpreters and translators. EPITA provides a forum for its member interpreters and translators to promote fellowship and good will within the profession.

SUMMARY OF ARGUMENT

Congress did not exclude the costs of translating written documents when it provided for the taxing of the compensation of "interpreters" in 28 U.S.C. § 1920(6). Regardless of whether they are translating oral or written communication, interpreters and translators perform essentially the same role in litigation. And substantially the same skill set is used to translate oral and written communication. Moreover, dictionary definitions of "interpreter" do not exclude translation of written documents. There is no good reason to believe that Congress intended to provide for the taxing of costs associated with translation of oral communication but intended to exclude the costs of translating written documents.

ARGUMENT

COSTS FOR "COMPENSATION OF INTERPRETERS" IN 28 U.S.C. § 1920 INCLUDES COSTS FOR TRANSLATION OF WRITTEN DOCUMENTS

Congress provided in 28 U.S.C. § 1920(6) that "[a] judge or clerk of any court of the United States may tax as costs * * * compensation of interpreters." In light of the commonly understood meaning of "interpreter," the structure and purpose of the statute, and the overlapping role of translators and interpreters, the term "interpreters" in Section 1920(6) should be read to include taxing of the cost of translating written documents.

A. Interpreters And Translators Perform Closely Related Work, Particularly In Litigation

Interpreters and translators perform the same function in litigation: making material in a foreign language able to be comprehended by the parties and the court. They both are necessary to litigate cases involving multiple languages; indeed, translators are vital in cases involving significant documentary evidence such as contract disputes. There is no good reason to believe that Congress provided for an award of the costs of translating oral communications but not the costs of translating written documents.

1. Translation of written and spoken language requires related skills

Petitioner attempts to draw a bright line between language professionals who translate oral communications and those who translate written documents. But such a clear distinction does not exist in practice. Regardless of whether the communication being translated is oral or written, the skills employed are closely related. To start, translators and interpreters must be fluent in both the source language and the target language. They must carefully decipher the correct meaning of the words in context in the source language. And they must determine the best way to communicate them in the language of the audience.

In both oral and written translation, context plays an important role. Interpreters and translators must pay careful attention to the context in which the source communication is made, because context

informs their understanding of the message and their ability to transmit that message effectively to a target audience. Rose Kennedy, *Much Ado About Noting: Problems in the Legal Translation Industry*, 14 Temp. Int'l & Comp. L.J. 423, 426 (2000) ("[W]ords denote not only their primary meaning, but also layers of nuance, slowly built up as a result of the historical context in which a culture has used that word."); Peter W. Schroth, *Legal Translation*, 34 Am. J. Comp. L. Supp. 47, 53-4 (1986) (observing that word-for-word translations that disregard context result in "awkward document[s]"); Eleanor Wong, *In the Space Between Words and Meaning: Reflections From Translating Lao Laws to English*, 2006 Sing. J. Legal Stud. 439, 444 (2006) ("[H]ow a reader understands the meaning of the legal, social and other factors underlying * * * words is extremely dependent on knowledge, experience and culture.").

For translators of written work, context is not limited to the surrounding text, but also includes relevant legal, literary, historical, or social factors. *See* Wong, *supra*, at 444. The same is true in translating oral communications. There, context also includes the source speaker's intonation, inflection, and physical mannerisms. There is significant overlap in how translators and interpreters incorporate these contextual cues—both must decipher the source's meaning and choose their target words accordingly. *See* Schroth, *supra*, at 54, 56 ("[E]very translation is a series of choices * * * [and] every choice can be discussed and second-guessed.").

Moreover, interpreters who primarily deal with oral communications often are called on to translate written documents. *See* Byron W. Daynes, *The Court Interpreter—An AJS Study*, 51 Judicature 135 (1967) ("[Court interpreter's] services may include both interpretation of oral testimony as well as the translation of documents written in a foreign tongue."). This is known as "sight translation" when it takes place in a legal context. *See* Hon. Lynn W. Davis & William E. Hewitt, *Lessons in Administering Justice: What Judges Need to Know About the Requirements, Role, and Professional Responsibilities of the Court Interpreter*, 1 Harv. Latino L. Rev. 121, 129-131 (1994). As its name suggests, sight translation sometimes occurs on the spot, in real time. At other times, however, judges may provide written documents to court interpreters "prior to the trial or hearing to increase the accuracy of sight translation." *Id.* at 131. Doing so provides the interpreter with more time and allows the interpreter access to additional resources, resulting in a translation that "better protects the rights of [litigants]." *Ibid.* In such cases, an interpreter's role is no different from a translator's.

Indeed, language professionals themselves recognize the close relationship between translating written and oral communications. Professional associations usually include both translators and interpreters. Amici are only two examples of such organizations. The nation's largest language professional association, the American Translators Association, includes interpreters and translators alike. *About the American*

Translators Association, Am. Translators Ass'n, http://www.atanet.org/aboutus/history.php (last visited Jan. 4, 2012). State and local organizations across the country also count translators and interpreters in their membership, including the Atlanta Association of Interpreters & Translators (aait.org), the Austin Area Translators and Interpreters Association (aatia.org), the Association of Translators and Interpreters of Florida (atifonline.org), the Hawaii Interpreters and Translators Association (hawaiitranslators.com), the Houston Interpreters and Translators Association (hitagroup.org), the Iowa Interpreters and Translators Association (iitanet.org), the Nebraska Association for Translators and Interpreters (natihq.org), the Nevada Interpreters and Translators Association (nitaonline.org), and the New York Circle of Translators, Inc. (nyctranslators.org).

This should not be surprising. As petitioner concedes, even the lay community generally does not distinguish interpreters from translators. Pet. Br. 20 ("laypersons are often unaware of th[e] distinction between interpreting and translating" (quoting Holly Mikkelson, Introduction to Court Interpreting 77 (2000))). Rather, "the terms 'translate' and 'interpret' are used interchangeably in everyday parlance." Davis & Hewitt, *supra*, at 129 n.33.

2. *Legal translation is an act of interpretation*

The close relationship between translation and interpretation is particularly true in the litigation context. The work of language professionals often is vital to litigating parties who need language professionals to present their case. To be of benefit, legal translators and interpreters must make interpretive choices regarding how to communicate across a language barrier while maintaining the same legal effect. *See* North Carolina Administrative Office of the Courts, *Interpreting in the Courts: The AOC's Guidelines*, 7 N.C. St. B.J. 24, 28 n.3 (2002) ("The principles that apply to interpreting also apply to translating."); Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165, 1192 (1993) ("[t]ranslation and legal interpretation share * * * a common core of interpretive problems").

Legal translation requires interpreters and translators to have much more than a base fluency in the target and source languages. They also must be proficient with legal vocabulary and terms of art, because legal terms vary not only by language but by legal system. *See* Wong, *supra*, at 444 ("Even if the same language is used by two legal systems, perfect equivalence is impossible by virtue of the fact that the two systems are different."). In a sense, legal terms represent a third language for the language professional. Kennedy, *supra*, at 426 (characterizing legal terminology as "a different language altogether"). Thus, if the languages of two different nations are

involved in the litigation, the language professional needs legal training and familiarity with the legal vocabularies of each nation to ensure that the legal concepts correspond. *Id.* at 425. That is true regardless of whether the communication being rendered is in oral or written form.

This is particularly true of translating Japanese legal communications given the "hidden multilingualism" of Japanese law. *See* Ichiro Kitamura, *Problems of the Translation of Law in Japan*, 23 Victoria U. Wellington L. Rev. 143, Monograph 7, at 5 (1993). Early Japanese law was modeled on Chinese legislation, and, following the Restoration of 1868, the Japanese Government began incorporating elements of Western law into its legal system. *See id.* at 1-2. As a result, Japanese law is an amalgamation of principles and terms derived from laws written in other languages. *See id.* at 3 ("Japanese positive law itself constitutes a whole translated world or is at least a town paved with an underlying multilingual mosaic."). "The choice of word" when translating Japanese legal documents, such as the contracts involved in this case, "therefore necessarily implies an interpretative decision." *Id.* at 11.

B. The Text Of Section 1920 Is Not So Narrow As To Exclude The Translation Of Written Documents

Section 1920 is consistent with the common-sense understanding that interpreters and translators perform closely related, and sometimes identical, work in litigation.

1. Section 1920 allows district courts to "tax as costs * * * compensation of interpreters." 28 U.S.C. § 1920(6). But the statute leaves "interpreters" undefined. "When terms used in a statute are undefined, [the Court] give[s] them their ordinary meaning." *Hamilton v. Lanning*, 130 S. Ct. 2464, 2471 (2010) (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)). The ordinary meaning of "interpreters," as recognized by the court of appeals below, as well as both language professionals and the lay community, includes those who translate oral communications and those who translate written ones. "Translators" should not be limited to a narrow meaning that is, at most, understood only in a technical sense among a small segment of the population.

Definitions found in dictionaries confirm that the meaning of "interpreters" is broader than petitioner contends. Dictionaries provide a useful guide to establish the common, ordinary meaning of a word in a statute. *See Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011). Dictionaries generally do not limit "interpreter" only to oral translation. An interpreter is commonly defined as "one that translates."

Webster's Third New Int'l Dictionary 1182 (1993); *see also* Funk & Wagnalls New Int'l Dictionary 665 (Comprehensive ed. 1996) (defining "interpreter" as "one who interprets or translates"). Indeed, dictionaries routinely define the word "interpret" as "translate," or they list the two words as synonyms. *See, e.g.*, The American Encyclopedic Dictionary 871 (1987) (defining "interpret" as "translate"); Heinemann English Dictionary 570 (1979) (defining "interpret" as "to translate"); The New Merriam-Webster Dictionary 392 (1989) (listing "translate" as a synonym for "interpret"); Webster's New American Dictionary 274-275 (1995) (same); Cambridge Dictionary of American English 458 (2000) (same).

These common definitions recognize that oral translation falls within the meaning of the term, and the definitions do not exclude translation of written communication. *See, e.g.*, Cambridge Dictionary of American English 458 (2000) (defining "interpret" as "to change (the words, *esp.* spoken words) into the words of another language" (emphasis added)).

Moreover, as respondent's brief demonstrates (Resp. Br. 16-18), "interpreter" regularly is used in common parlance to refer to a person translating documents. And petitioner concedes that "laypersons are often unaware of the distinction between interpreting and translating." Pet. Br. 20 (brackets omitted). There is no reason to believe that Congress departed from that ordinary use to adopt a narrow construction used, at most, by a small segment of those in the field. Had that been Congress's intent, it

could have expressly narrowed Section 1920(6) to oral interpretation.

2. The word "interpreter" in Section 1920(6) must be read in context and with a view to its place in the overall statutory scheme. *McNeill v. United States*, 131 S. Ct. 2218, 2222-2223 (2011). When Congress enacted the Court Interpreters Act in 1978, it chose to codify the text of paragraph (6) within a statutory provision, Section 1920, that primarily concerns written documents. At the time, paragraphs (1) to (5) of Section 1920 already were in existence. Paragraph (2) permitted the taxing of fees "for all or any part of the stenographic transcript." 28 U.S.C. § 1920(2) (1978). Paragraph (3) concerned "[f]ees and disbursements for printing." *Id.* § 1920(3) (1978). And paragraph (4) permitted the taxing of "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." *Id.* § 1920(4) (1978). Congress's choice to place paragraph (6) within Section 1920 indicates it likewise covers written documents, and nothing indicates that it should be read as standing alone among those paragraphs as pertaining only to oral communications.

3. The relevant legislative history indicates that the drafters of the Court Interpreters Act were not drawing the distinction that petitioners urge here. For example, the House and Senate Reports used "interpretation" and "translation" interchangeably. *See, e.g.*, H.R. Rep. No. 95-1687, at 4 (1978) ("appointment of certified interpreters is designed to insure not only an accurate translation but also an impartial

one"); *id.* at 7 ("simultaneous translation," "the consecutive mode" of "translat[ing]," and "[s]ummary translations"); S. Rep. No. 95-569, at 1 (1977) ("The bill as originally introduced provided for translation services only for non-English-speaking people in the Federal courts."); *id.* at 8 ("[s]imultaneous translation," "[c]onsecutive translation," and "summary translation").

CONCLUSION

For the reasons set forth above and in respondent's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

DEANNE E. MAYNARD
BRIAN R. MATSUI
Counsel of Record
MARC A. HEARRON
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-8784
bmatsui@mofo.com

Counsel for Amici Curiae

JANUARY 18, 2012

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
DEC 5 - 2011
OFFICE OF THE CLERK

10-1472

In The
Supreme Court of the United States

KOUICHI TANIGUCHI,

Petitioner,

v.

KAN PACIFIC SAIPAN, LTD.
doing business as Marianas Resort and Spa,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* INTERPRETING AND TRANSLATION PROFESSORS IN SUPPORT OF PETITIONER

M. Scott Barnard
Counsel of Record
Scott T. Williams
Patrick G. O'Brien
John B. Capehart
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1700 Pacific Avenue
Suite 4100
Dallas, Texas 75201
sbarnard@akingump.com
(214) 969-2800

Counsel for *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether costs incurred in translating written documents are "compensation of interpreters" for purposes of 28 U.S.C. § 1920(6).

TABLE OF CONTENTS

Page

BRIEF OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. INTERPRETING IS DEFINED AS AN ORAL DISCIPLINE; TRANSLATION IS A WRITTEN ONE. 7

II. DIFFERENT LANGUAGE SKILLS APPLY TO INTERPRETERS AND TRANSLATORS. 18

III. INTERPRETERS AND TRANSLATORS ARE SUBJECT TO DISTINCT PREPARATION AND ARE CONSIDERED DIFFERENT PROFESSIONS. .. 25

A. Interpreters and Translators Generally Have Separate Training Programs. 26

B. United States Court Interpreters Must Be Certified Through A Rigorous Examination 29

C. Different Professional Associations Generally Represent Interpreters and Translators. 35

D. Interpreting and Translation Research Also Demonstrates the Distinctions. 36

CONCLUSION 38

TABLE OF AUTHORITIES

CASES

BDT Products, Inc. v. Lexmark Int'l, Inc.,
405 F.3d 415 (6th Cir. 2005) 8

Extra Equipamentos E Exportacao Ltda. v. Case Corp.,
541 F.3d 719 (7th Cir. 2008) 8

Hamilton v. Lanning,
130 S. Ct. 2464 (2010) 9

Kasten v. Saint-Gobain Performance Plastics Corp.,
131 S. Ct. 1325 (2011) 9

Louisiana Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986) 9

Parker v. Flook,
437 U.S. 584 (1978) 9

Taniguchi v. Kan Pacific Saipan, Ltd.,
633 F.3d 1218 (9th Cir. 2011) 9

Utah v. Evans,
536 U.S. 452 (2002) 9

STATUTES

28 U.S.C.
§ 1827 ..... 14, 29
§ 1920(6) ..... *passim*

OTHER AUTHORITIES

AIIC – Professional Conference Interpreters Worldwide, http://aiic.net 35

American Translators Association, ATA Certification Exam, http://www.atanet.org/certification/aboutexams_overview.php 32, 33

ASTM International, ASTM F2089-01 STANDARD GUIDE FOR LANGUAGE INTERPRETATION SERVICES (2007) 10-11, 13

ASTM International, ASTM F2575-06 STANDARD GUIDE FOR QUALITY ASSURANCE IN TRANSLATION (2006) 17

ASTM International, Technical Committee F43 on Language Services and Products Fact Sheet, http://www.astm.org/COMMIT/F43_Fact-sheet711.pdf 10

B. Moser-Mercer, "Beyond Curiosity: Can Interpreting Research Meet the Challenge?" *in* COGNITIVE PROCESSES IN TRANSLATION AND INTERPRETING (Joseph Danks, et al. eds, 1997) 37

CFI – California Federation of Interpreters, http://www.calinterpreters.org 35

COGNITIVE PROCESSES IN TRANSLATION AND INTERPRETING (Joseph Danks, et al. eds, 1997) 37

Consortium for State Court Interpreter Certification, Overview of the Oral Performance Examination for Prospective Court Interpreters (July 2005), *available at* http://www.csconline.org/D_Research/Court-Interp/Web%207%20Overview%20of%20the%20Oral%20Exam.pdf 32

Consortium for State Court Interpreter Certification, Overview of the Written Examination for Candidates (Jan. 2005), *available at* http://www.ncsconline.org/D_Research/CourtInterp/Web%2010%20Overview%20of%20the%20Oral%20Exam.pdf 32

CyraCom, LLC, Interpreter Skills Assessment, http://www.cyracom.com/Training/ISA 34

Daniel Gile, BASIC CONCEPTS AND MODELS FOR INTERPRETER AND TRANSLATOR TRAINING (1995) 20-21, 23, 24

David Crystal, THE CAMBRIDGE ENCYCLOPEDIA OF LANGUAGE (2010) 12

Elena M. de Jongh, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE (1992) 17, 19

Eva N.S. Ng, *The Tension Between Adequacy and Acceptability in Legal Interpreting and Translation, in* THE CRITICAL LINK 5: QUALITY IN INTERPRETING – A SHARED RESPONSIBILITY (Sandra Hale et al. eds., 2009) 22, 24-25

European Personnel Selection Office, Ongoing Competitions – Translators/Interpreters, http://europa.eu/epso/apply/on_going_competitions/tra/index_en#chapter10 33

Federal Court Interpreter Certification Examination Information, Frequently Asked Questions, http://www.ncsconline.org/d_research/fcice_exam/faq.htm 29, 35

Federal Court Interpreter Certification Examination Examinee Handbook (2011), *available at* http://www.ncsconline.org/d_research/fcice_exam/2011approvedbyAO-Online.pdf 30-31

Franz Pöchhacker, INTRODUCING INTERPRETING STUDIES (2004) 36

H.R. Rep. No. 95-1687 (1978) 14

Holly Mikkelson, INTRODUCTION TO COURT INTERPRETING (2000) ..... *passim*

Interagrency Language Rountable, http://www.govtilr.org 34

Interagency Language Rountable, ILR Skill Level Descriptions for Interpretation Performance, http://www.govtilr.org/skills/interpretationSLDsapproved.htm 13

Interagency Language Roundtable, ILR Skill Level Descriptions for Translation Performance, http://www.govtilr.org/skills/AdoptedILRTranslationGuidelines.htm 17, 18

International Medical Interpreters Association, http://imiaweb.org 35

J. Danks & J. Griffin, "Reading and Translation: A Psycholinguistic Perspective" *in* COGNITIVE PROCESSES IN TRANSLATION AND INTERPRETING (Joseph Danks, et al. eds, 1997) 37

James Nolan, INTERPRETATION: TECHNIQUES AND EXERCISES (2005) 11,13, 23, 24

Janice H. Humphrey & Bob J. Alcorn, SO YOU WANT TO BE AN INTERPRETER: AN INTRODUCTION TO SIGN LANGUAGE INTERPRETING (1995) 15

Kelly Wiechart, *Written vs. Oral Communication* (Aug. 2007), http://www.uiw.edu/owc/Handouts/Written%20vs%20Oral%20Comm-unication.doc 19

Kent State University, Dept. of Modern and Classical Language Studies, M.A. in Translation, http://www.kent.edu/mcls/graduate/ma_translation.cfm 27, 28

Language Line Services, Our Company, http://www.languageline.com/page/our_company 34

Lion-Bridge Technologies, Inc., Legal and Court Interpretation, http://en-us.lionbridge.com/Interpretation.aspx?pageid=1334&LangType=1033 34

Model Code of Professional Responsibility for Interpreters in the Judiciary, in COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS (William E. Hewitt ed. 1995) 22

Monterey Institute of International Studies, Courses, http://www.miis.edu/academics/programs/tanslationinterpretation/courses 28

Monterey Institute of International Studies, MA in Conference Interpretation, http://www.miis.edu/academics/programs/conferenceinterpretation 26

Monterey Institute of International Studies, MA in Translation,http://www.miis.edu/academics/programs/translation 27

Monterey Institute of International Studies, MA in Translation & Interpretation, http://www.miis.edu/academics/programs/translationinterpretation 26, 27

Monterey Institute of International Studies, MA in Translation & Localization Management, http://www.miis.edu/academics/programs/translationlocalization 27

Mary Phelan, THE INTERPRETER'S RESOURCE (2001) 11, 31

NAJIT, Frequently Asked Questions About Court and Legal Interpreting and Translating, http://www.najit.org/certification/faw.php#difference 12, 17

National Center for State Courts, Contact Persons for State and Federal Interpreter Programs, http://www.ncsconline.org/D_Research/CIConsortContactspage.html 31

Northern California Translators Association, http://ncta.org 36

Roseann Duenas González, Victoria F. Vásquez & Holly Mikkelson, FUNDAMENTALS OF COURT INTERPRETATION: THEORY POLICY AND PRACTICE (1991) ..... *passim*

ROUTLEDGE ENCYCLOPEDIA OF TRANSLATION STUDIES (Mona Baker, ed. 2009) 6

THE INTERPRETING STUDIES READER (Franz Pöchhacker & Miriam Shlesinger, eds., 2002) 11, 16, 19

TRANSLATION AND COGNITION (Gregory Shreve & Erik Anoleone eds., 2010) 37-38

United Nations, Notice – 2011 Competitive Examinations for English-Language Interpreters (2011), *available at* http://www.un.org/Depts/OHRM/examin/11einot.doc 33

United Nations, Notice – 2010 Competitive Examination for French-Language Translators/Précis-Writers (2010), *available at* http://www.un.org/Depts/OHRM/examin/10ftrnote.doc 33

U.S. Department of State Office of Language Services, Interpreting Division, http://languageservices.state.gov/Content/documents/LS%20information%20for%20interpreters.doc 33

U.S. Department of State Office of Language Services, Translating Division, http://languageservices.state.gov/content.asp?content_id=207&menu_id=108 33

United States Federal Courts, Three Categories of Interpreters, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts/CourtInterpreters/InterpreterCategories.aspx 30

WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) 8

WEBSTER'S THIRD NEW INT'L DICTIONARY (1976) 8

BRIEF OF *AMICI CURIAE*[1]

Amici curiae Interpreting and Translation Professors respectfully request that this Court consider this Brief in Support of Petitioner.

INTEREST OF *AMICI*

Amici curiae are scholars with expertise in the language services industry. *Amici* have extensive experience with the education and training of interpreters and translators, as well as the research into the different disciplines. *Amici* believe that the finding of the Circuit Courts of Appeals that document translators are encompassed within the term "interpreters" under 28 U.S.C. § 1920(6), including the Ninth Circuit in this case, have misunderstood how the term "interpreters" is commonly understood in the language services industry. As shown in this Brief, interpreting is defined in the industry as an oral discipline involving specific oral skills that are fundamentally different from those required for written document translation. Interpreting is also considered a distinct profession from translation, as interpreters are subject to different education and training from translators. *Amici* submit this Brief in support of Petitioner's position that the term "interpreters" in 28 U.S.C. § 1920(6), as commonly used by practitioners, trainers,

---

[1] The parties have consented to the filing of this brief in letters that are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, this Brief was not written in whole or in part by counsel for any party and no person or entity other than counsel for *amici* has made a monetary contribution to the preparation and submission of this Brief.

and scholars, does not include translation of written documents.

Richard Brecht, Ph.D., is the founding executive director of the University of Maryland Center for Advanced Study of Language (CASL) and Professor of Slavic languages and literatures at the University of Maryland. Prior to his work at CASL, Dr. Brecht was the director of the National Foreign Language Center, where he published numerous policy papers on national foreign language needs, particularly in the federal government.

Joseph Danks, Ph.D., is Research Professor and the director of strategic initiatives at the University of Maryland Center for Advanced Study of Language (CASL). As director of strategic initiatives, Dr. Danks oversees CASL research in language analysis, and has conducted research on the cognitive processes used in translation and on how to evaluate translation performance, focusing primarily on language analysts and translators in the federal government. Dr. Danks was previously a professor and chair of the Department of Psychology, as well as dean of the College of Arts and Sciences, at Kent State University, until retiring and taking *emeritus* status in 2004. Dr. Danks also participated in the Institute of Management and Leadership in Higher Education at Harvard University in 2002.

Françoise Massardier-Kenney, Ph.D., is Director of the Institute for Applied Linguistics at Kent State University, the largest comprehensive translation program in the United States, where she teaches in the graduate program in translation. She is the editor of the American Translators Association

Scholarly Series. Professor Massardier-Kenney's recent publications include Translation Slavery, a translation of Sand's Valvèdre, of Antoine Berman's Toward a Translation Criticism, Literature in Translation, and articles on translation theory and pedagogy.

Dominic W. Massaro, Ph.D., is Professor of Psychology and Computer Engineering at the University of California, Santa Cruz. Dr. Massaro is director of the Perceptual Science Laboratory and Chair of Digital Arts and New Media M.F.A. program. Dr. Massaro has published numerous academic journal articles, and written and edited several books, and is also currently the book review editor of the American Journal of Psychology and founding co-editor of the journal Interpreting.

Holly Mikkelson, M.A., is Adjunct Associate Professor of Spanish Translation and Interpreting at the Graduate School of Translation, Interpretation & Language Education, the Monterey Institute of International Studies, a Graduate School of Middlebury College. She is a certified court interpreter and translator and has written numerous books, manuals and articles on court interpreting and legal translation.

Barry Slaughter Olsen, M.A., is Assistant Professor of Translation and Interpretation at the Graduate School of Translation, Interpretation & Language Education, and Chair of Interpretation, at the Monterey Institute of International Studies, a Graduate School of Middlebury College. He is a conference interpreter and translator and is an active member of the International Association of

Conference Interpreters, serving on the Association's Traning Committee. He is the founder and Co-President of InterpretAmerica, which organizes the North American Summits on Interpreting, and Co-Chair of the IAMLADP Universities' Contact Group, which serves as a liaison between international organizations and universities that train interpreters and translators.

Kelly Washbourne, Ph.D., is Associate Professor of Spanish Translation at Kent State University and graduate of the Monterey Institute of International Studies. His research is in literary translation and translation pedagogy. His English-language edition of Nobel Prize-winning writer Miguel Angel Asturias's LEYENDAS DE GUATEMALA (LEGENDS OF GUATEMALA) was awarded National Endowment for the Arts and National Endowment for the Humanities fellowships in 2010. A translator trainer in the doctoral program at Kent State, he serves on the Editorial Board of *The Interpreter and Translator Trainer* and the Advisory Board of *Current Trends in Translation Teaching and Learning*, and is co-editor of the coursebook series Translation Practices Explained (St. Jerome, UK).

Sue Ellen Wright, Ph.D., is Professor of German Translation at Kent State University and a recognized international terminology expert. Dr. Wright's primary research focus is on the management of technical terminology for translators, technical writers, and standardizers. Dr. Wright has published numerous articles and edited books in the field of terminology management and translation studies. In addition, Dr. Wright is an ATA accredited

translator, the Chair of the US Technical Advisory Group for ISO TC 37, Terminology, and a member of ASTM F43, Language Services and Products, developing standards for language training and assessment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The parties disagree as to whether document translators should be considered "interpreters" within the meaning of 28 U.S.C. § 1920(6). Because there is no definition of the term "interpreters" in § 1920(6), the Court may look to how that term is commonly used in the language services industry to determine its meaning. *Amici* believe that the Court should hold that the term "interpreters" under 28 U.S.C. § 1920(6) does not include document translation services.

Amici are familiar with how the term "interpreter" is commonly used in the language services industry. Specifically, interpreting is defined in the industry as an oral skill, while translation is defined as a written one. Although interpreters and translators share the skill sub-set of proficiency in two or more languages, different language skills apply to each discipline. Interpreters must be articulate speakers and good listeners, and they require attention sharing skills and distinct processing skills that allow them to quickly grasp the meaning of a word or phrase in one language and convey the same meaning to the listener in a different language under extreme time constraints (simultaneously or with a few minutes delay, depending on the mode of interpreting). Interpreting

is generally accomplished through the reformulating of the speaker's message to convey the same meaning within the linguistic constraints of the listener's language, at times omitting minor aspects of meaning for the sake of comprehensibility and efficiency. In contrast, a translator is given a written text and tasked with determining more precisely the best word or phrase to convey what is stated in the original language for a given audience or communicative situation. Translators do not face the same time pressures as those imposed on interpreters, as they are able to research the meaning of words and phrases while they are translating, consult with colleagues, contemplate the use of different words and phrases over a long period of time, and revise their written product.

Most experts in the language services industry consider that "the two are very different, even incompatible professions." ROUTLEDGE ENCYCLOPEDIA OF TRANSLATION STUDIES 41 (Mona Baker, ed. 2009). As a result, interpreters' training differs significantly from that of translators. Further, federal court Spanish-language interpreters are required to pass a certification examination, which is administered over a two-year period. Importantly, this certification process is not required for translators, including those who translate documents in discovery for use in cases pending in federal court. Interpreters and translators also have separate professional groups that represent each discipline, further demonstrating the distinctions.

Accordingly, in the language services industry, interpreting is considered a distinct profession from

translation, and document translation does not fall within the scope of interpreting services. For this reason, *amici* support Petitioner's position that the Court should find that document translators do not fall within the meaning of "interpreters" under 28 U.S.C. § 1920(6).

ARGUMENT

I. INTERPRETING IS DEFINED AS AN ORAL DISCIPLINE; TRANSLATION IS A WRITTEN ONE.

This case concerns the definition of the term "interpreters" in 28 U.S.C. § 1920(6), which permits the taxing of the "compensation of interpreters" as costs in the federal courts. The parties dispute the definition of the term "interpreter" under this statute, and whether "interpreter" should be limited to oral services (as Petitioner argues), or encompass written document translation services as well (as Respondent argues). Courts reviewing this issue have generally relied on certain dictionary definitions of the term to support their positions, but little attention has been paid to the common usage in the industry. In the language services industry interpreting is plainly defined as an oral discipline, while translation is defined as a written one. Interpreting and translation services are considered distinct disciplines, with distinct skill sets, and the common usage of the term "interpreter" encompasses oral interpreting services, not document translation. *Amici* therefore support Petitioner's position that, in keeping with how the term is commonly used in the industry, "interpreters" should not encompass the

distinct and separate activity of document translation.

1. In determining the definition of the term "interpreting" under § 1920(6), the courts have generally relied on certain dictionary definitions, with little attention to the common usage in the industry. *See, e.g.*, *Extra Equipamentos E Exportacao Ltda. v. Case Corp.*, 541 F.3d 719, 728 (7th Cir. 2008) (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 1182 (1981));[2] *BDT Products, Inc. v. Lexmark Int'l, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005) (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 1182 (1981)).[3] The Ninth Circuit in this case specifically relied on the Sixth Circuit's reasoning in *BDT Products* for its holding, which "relied on a dictionary [Webster's Third New International Dictionary] definition of interpret ... [and] concluded that 'translation' services and 'interpretation' services are

---

[2] The Seventh Circuit also noted, without much clarification, that "[a]n interpreter as normally understood is a person who translates living speech from one language to another," and that "the translator of a document is not referred to as an interpreter." *Extra Equipamentos*, 541 F.3d at 727.

[3] Webster's Third New International Dictionary defines "interpreter" as "one that translates; *esp* : a person who translates orally for parties conversing in different tongues." WEBSTER'S THIRD NEW INT'L DICTIONARY 1182 (1976). In addition, Webster's Collegiate Dictionary defines "interpreter" as "one who translates orally for parties conversing in different languages." WEBSTER'S COLLEGIATE DICTIONARY 654 (11th ed. 2003). *See also* Brief of Petitioner at 13-16 (citing multiple dictionary definitions of "interpreting" as encompassing a form of oral translation).

interchangeable." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 633 F.3d 1218, 1221 (9th Cir. 2011).

The manner in which a term is commonly used in the industry can often be helpful in the Court's determination of the proper definition of a statutory term. *See Kasten v. Saint-Gobain Performance Plastics Corp*, 131 S. Ct. 1325, 1331–33 (2011) (noting that where dictionary definitions differ, the "dictionary meanings, even if considered alone, do not necessarily limit the scope of the statutory phrase" to one certain meaning, and determination may be made through examination of other uses within the statute, in other statutes, in agency regulations, and in common usage); *Hamilton v. Lanning*, 130 S. Ct. 2464, 2471 (2010) ("When terms used in a statute are undefined, [the Court] give[s] them their ordinary meaning.") (internal quotation marks omitted); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 372 (1986) ("[T]echnical terms of art should be interpreted by reference to the trade or industry to which they apply."). Specifically, the Court may look to the "technical literature" to determine the proper definition of a statutory term. *See Utah v. Evans*, 536 U.S. 452, 467 (2002) (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974)) (examining texts and papers containing definitions of statutory term of art with technical meaning). Moreover, *amici curiae* from the professional industry may provide valuable guidance as to the Court's interpretation of statutory terms. *See Parker v. Flook*, 437 U.S. 584, 587 n.7 (1978) (noting that "[t]he term 'software' is used in the industry to describe computer programs," and citing to the Brief for the Computer & Business

Equipment Manufacturers Association as *Amicus Curiae*).

Because little attention in the cases has been paid to the common usage of the term "interpreters" in the language services industry, *amici* attempt to provide some clarification to the Court on this point.

2. The common meaning of the word "interpreters" in the language services industry unquestionably refers to an oral discipline, while translation refers to written work. For example, one of the world's largest developers and publishers of voluntary consensus technical standards, the American Society for Testing and Materials ("ASTM"), recognizes that translation and interpreting are different activities requiring different technical specifications. The ASTM Main Committee F 43, Language Services and Products, maintains separate sub-committees for Interpreting and Translation, each with its own set of projects and proposed new standards. *See* ASTM International, Technical Committee F43 on Language Services and Products Fact Sheet, http://www.astm.org/COMMIT/F43_FactSheet711.pdf (last visited Dec. 3, 2011) ("The scope of the Committee shall be the development of standards (specifications, guides, test methods, classifications, practices, and terminology) for language services and products."). The ASTM standards for interpreting define "interpretation" as "the process of understanding and analyzing a *spoken or signed* message and re-expressing that message faithfully, accurately and objectively in another language, taking the cultural and social context into account." ASTM International, ASTM

F2089-01 STANDARD GUIDE FOR LANGUAGE INTERPRETATION SERVICES § 3.1 (2007) (emphasis added).

Likewise, a number of texts define or use the term "interpreter" to refer only to those performing oral interpreting services. *See, e.g.*, Mary Phelan, THE INTERPRETER'S RESOURCE 6 (2001) ("Interpreting takes place when one person translates *orally* what he or she hears into another language.") (emphasis added); James Nolan, INTERPRETATION: TECHNIQUES AND EXERCISES 3 (2005) ("Interpretation can be defined in a nutshell as conveying understanding.... An interpreter listens to a spoken message in the source language and renders it *orally*, consecutively or simultaneously, in the target language.") (emphasis added); THE INTERPRETING STUDIES READER 2-3 (Franz Pöchhacker & Miriam Shlesinger eds., 2002) ("Interpreting then can be defined most broadly as interlingual, intercultural *oral or signed* mediation, enabling communication between individuals or groups who do not share, or do not choose to use, the same language(s).") (emphasis added); Holly Mikkelson, INTRODUCTION TO COURT INTERPRETING 67 (2000) ("[I]nterpreting is the transfer of an oral message from one language to another in real time (as opposed to translating, which is transfer of a written message from one language to another and may take place years after the original message is written ....")); Roseann Duenas González, Victoria F. Vásquez & Holly Mikkelson, FUNDAMENTALS OF COURT INTERPRETATION: THEORY POLICY AND PRACTICE 33-34 (1991) ("*Interpretation* almost universally refers to the transfer of meaning from one language into another for the purpose of

oral communication between two persons who do not share the same language."); *see also* David Crystal, THE CAMBRIDGE ENCYCLOPEDIA OF LANGUAGE 354 (2010) ("In specific professional contexts, however, a distinction is drawn [between interpretation and translation] ....").

As well, a number of professional organizations provide definitions for "interpreter" that indicate distinction from translators. For example, the National Association of Judiciary Interpreters and Translators ("NAJIT"), a professional organization representing both interpreters and translators, also specifically defines "interpretation" as an oral skill. NAJIT, Frequently Asked Questions About Court and Legal Interpreting and Translating, http://www.najit.org/certification/faq.php#difference (last visited Dec. 3, 2011) ("Interpretation is the process by which oral communication is rendered from one language to another. The original is either spoken or signed language, and the rendition is delivered either in another spoken language or in a signed language."). In addition, the Interagency Language Roundtable ("ILR"), an organization representing multiple federal agencies in which foreign languages are used in federal government employment, has established skill level descriptions for several language tasks, including "interpretation performance." The ILR defines "interpretation" as "involv[ing] the immediate communication of meaning from one language to another." Further, ILR notes that "an interpreter conveys meaning orally ... [and] [a]s a result, interpretation requires skills different from those needed for translation." Interagency Language Roundtable, ILR Skill Level Descriptions for

Interpretation Performance, http://www.govtilr.org/skills/interpretationSLDsapproved.htm (last visited Dec. 3, 2011).

Thus, in the language services industry, the term "interpreter" is commonly defined as encompassing an oral skill.

3. Moreover, as used in the industry, the term "interpreter" generally refers to two basic modes of interpreting services: simultaneous and consecutive. ASTM defines "simultaneous interpretation" as "a highly complex cognitive activity that requires the interpreter to listen, analyze, comprehend, convert, edit, and reproduce in real time a speaker or signer's message while the speaker or signer continues to speak or sign, in a specific social context." ASTM F2089-01, *supra*, § 3.2. "Consecutive interpretation" is defined as "a highly complex cognitive activity that requires the interpreter to listen, analyze, comprehend, convert, edit, and reproduce the original message after the speaker or signer pauses, in a specific social context." *Id.* § 3.3. To perform consecutive interpreting, the interpreter generally will use a note-taking system to supplement his or her memory of the source message. *See* Nolan, *supra*, at 294 ("Note-taking is most important to the consecutive interpreter."); *see also* Mikkelson, *supra*, at 70-72; González, Vásquez & Mikkelson, *supra*, at 387-88 ("Very few words of the original message are written down, because interpreters focus on ideas, not words."). Both consecutive and simultaneous

interpreting are used in courtrooms. *See* Mikkelson, *surpa*, at 73.[4]

A related discipline—"sight translation"—is also considered a form of interpreting. Sight translation is a hybrid skill that involves both oral and written language, *i.e.*, the oral interpretation of a written text. Mikkelson, *supra*, at 76. In a legal setting, a sight translator is the equivalent of an interpreter, as sight translation requires the same speaking skills and precision, and is subject to the same pressures and time constraints, as legal interpreting. *Id.* Sight translation also does not involve the extensive research and editing that translations must undergo. *Id.* Thus, despite the name, a person conducting a sight translation in the courtroom should be considered an "interpreter" under 28 U.S.C.§ 1920(6). *Id.* Longer, technical documents should not be sight translated, but

---

[4] Indeed, in the Court Interpreters Act, Congress acknowledged the simultaneous and consecutive modes of interpretation and specifically requires simultaneous or consecutive interpretation in certain federal court proceedings. H.R. Rep. No. 95-1687, at 8 (1978) (describing simultaneous interpretation as "interpret[ing] and ... speak[ing] contemporaneously with the individual whose communication is being translated" and consecutive interpretation as "the speaker ... paus[ing] to allow the interpreter to convey the testimony given" and "allow[ing] the interpreter to condense and distill the speech of the speaker"). Pursuant to the current version of the Court Interpreters Act, as codified at 28 U.S.C. § 1827, simultaneous interpretation is used for interpreting "for any party to a judicial proceeding instituted by the United States," and consecutive interpretation is used for interpreting "for witnesses." 28 U.S.C. § 1827(k).

instead should be assigned to a professional translator. *Id.*

In addition, interpreting also refers to the use of sign language. Sign language is a visual medium of communication, and therefore does not have a written form (although various methods of representing signed messages in writing have been developed). As with oral interpreting, courtroom sign language interpreting involves taking the spoken words and conveying the meaning of those words in a different language through signs, or vice versa. *See* Janice H. Humphrey & Bob J. Alcorn, SO YOU WANT TO BE AN INTERPRETER: AN INTRODUCTION TO SIGN LANGUAGE INTERPRETING (1995).

Whether interpreting simultaneously or consecutively, or through sign language, an interpreter listens to a speaker's words, processes the meaning of those words from one language to another, and then conveys the *meaning* of the speaker's words to the listener in another language. Mikkelson, *supra*, at 70 ("What is really meant by a 'verbatim' interpretation is that every single element of meaning in the source-language message must be accounted for in the target-language version."); González, Vásquez & Mikkelson, *supra*, at 322 ("In order for the judge and jury to hear exactly what the witness is saying, the interpreter must convey to the actors in the courtroom ... every element of the witness's message as if they were speakers of the [source language] and the interpreter were not there.... In court interpretation, conservation of meaning takes precedence over all other considerations."). Interpreting generally involves

conveying this meaning into another language through reformulation or restructuring of what was spoken. Mikkelson, *supra*, at 74 ("[I]nterpreters must 'repackage' the message to make it understandable in the target language."); González, Vásquez & Mikkelson, *supra*, at 155 ("The interpreter is required 'to transfer all of the meaning he or she hears from the source language into the target language ....'") (quoting R.D. Gonzalez, FEDERAL COURT INTERPRETER CERTIFICATION EXAMINATION MANUAL 5 (1986)). It is not necessary that the interpreter provide a literal, word-for-word translation of what is said by the speaker, nor indeed is it desirable—"literal" should not be confused with accurate. THE INTERPRETING STUDIES READER at 120; González, Vásquez & Mikkelson, *supra*, at 281 ("Interpretation by language-deficient interpreters is marked by literal translation; interpreters focus not on the essential ideas but rather on the words, exchanging words between the [source language] and [the target language] without converting or conserving the crucial concept."). The basic underlying tenet for each of these forms of interpreting is the processing of oral speech from one language into another in a short time period and the conveying of the meaning and equivalent pragmatic effect of the speaker's words or phrases.

4. In contrast, the term "translation" is commonly understood to refer to the process of comprehending a written text and transferring the meaning contained therein to a written text produced in another language. For example, ASTM International defines "translation" as the "process comprising the creation of a *written* target text base

on a source text in such a way that the content and in many cases, the form of the two texts, can be considered to be equivalent." ASTM International, ASTM F2575-06 STANDARD GUIDE FOR QUALITY ASSURANCE IN TRANSLATION § 3.1.42 (2006) (emphasis added); *see also* Elena M. de Jongh, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 35 (1992) ("*Translation* generally refers to the transfer of thoughts and ideas from one language (the source language) to another (the target language) by means of the written word."). Translation is not done in a short period of time, and may involve any combination of research, consultation, and trial-and-error contemplation of different words and phrases to arrive at the "best" translation of the original text.

Other professional organizations also define translation as synonymous with written documents. For example, NAJIT defines "[t]ranslation" as "the process by which written text is rendered from one language to another. The original is in written form, and the translation into the other language is also produced in written form." NAJIT, Frequently Asked Questions About Court and Legal Interpreting and Translating,http://www.najit.org/certification/faq.php #difference (last visited December 3, 2011). And the ILR defines "translation" as "normally reserved for written renditions of written materials." Interagency Language Roundtable, ILR Skill Level Descriptions for Translation Performance, http://www.govtilr.org/ skills/AdoptedILRTranslationGuidelines.htm (last visited Dec. 3, 2011). Indeed, the ILR notes that "[t]ranslation is thereby distinct from interpretation,

which produces a spoken equivalent between two languages." *Id.*

5. Accordingly, within the language services industry, the term "interpreter" is used to describe someone who performs simultaneous and consecutive interpretation of oral speech (including sign language). This term does not encompass the translation of written documents. Instead, the separate term "translator" describes this practice, which is considered a distinct practice. For these reasons, *amici* believe that the Court should find that document translation services do not fall within the scope of the term "interpreters" under 28 U.S.C. § 1920(6).

II. DIFFERENT LANGUAGE SKILLS APPLY TO INTERPRETERS AND TRANSLATORS.

Not only does the fact that the terms "interpreter" and "translator" are defined differently in the industry support a distinction between the two disciplines, but the different skills used by interpreters and translators also make clear this distinction. The skills required to perform proper interpreting services do not coincide entirely with those required for translation. Mikkelson, *supra*, at 77 ("In fact, translating and interpreting, while closely related, are different skills that not everyone is capable of mastering equally ...."). Indeed, although court interpreters may accept translation assignments, very few are trained for translation, and they tend to regard it as a sideline task in the industry performed as a courtesy to regular interpreting clients. *See id.* ("In any case, it is

important for interpreters to candidly assess their translation ability and to turn down translation assignments if they feel they cannot perform the task adequately.").

1. When examining the distinction between interpreters and translators, it is important to emphasize the difference between messages that are conveyed in writing and those that are conveyed orally. Generally speaking, written language is static (and in the case of legal language, frozen and formal); oral language is dynamic and immediate. *See* de Jongh, *supra*, at 36 ("[T]ext, regardless of its quality, is static, immutable in its form and fixed in time.... [A] spoken message ... must be immediately transformed and communicated orally in the target language."); THE INTERPRETING STUDIES READER, *supra*, at 388-89; González, Vásquez & Mikkelson, *supra*, at 264. Written discourse tends to be much denser and more convoluted than extemporaneous spoken language, because the reader has more time to process the message than the recipient of oral discourse. González, Vásquez & Mikkelson, *supra*, at 295. Written language also tends to be more precise, because the lack of paralinguistic features such as voice inflection, gestures and pauses may require additional verbiage. *Id.* at 402; Kelly Wiechart, *Written vs. Oral Communication* (Aug. 2007), http://www.uiw.edu/owc/Handouts/Written%20vs%20Oral%20Communication.doc.

Spontaneous speech also often involves implicit messages in the form of sentence fragments that cannot be conveyed completely in another language because of different grammatical and

syntactical features. *See* González, Vásquez & Mikkelson, *supra*, at 237-251, 478 (noting that the interpreter is likely to encounter multiple different nuances, variations, and cultural meanings of speech). Generally, because of the nature of their work and the conditions in which they perform it, translators could not do the same job as interpreters, and vice versa. *See* Mikkelson, *supra*, at 77 (noting that it is "important for interpreters to candidly assess their translation ability and to turn down translation assignments if they feel they cannot perform the task adequately."); González, Vásquez & Mikkelson, *supra*, at 407 ("If a translation of the entire document is required, interpreters should inform the court how long they think it will take to do the research. If they do not feel competent to translate the document at all, this should be made clear.").

2. Further, the fundamental skills that interpreters must have relate to their oral language proficiency. Interpreters must be articulate speakers, and must have an active command of two or more languages (since they interpret both into and out of English in the United States court system). González, Vásquez & Mikkelson, *supra*, at 19 ("The interpreter's vocabulary must be of considerable depth and breadth to support the wide variety of subjects that typically arise in the judicial process."). They must also have a great deal of mental agility in order to solve linguistic problems on their feet, in real time. *See id.* ("These cognitively complex tasks demand acute memory, concentration, and analysis skills."). These skills require listening and analysis, speech production and short-term memory. Daniel

Gile, BASIC CONCEPTS AND MODELS FOR INTERPRETER AND TRANSLATOR TRAINING 162 (1995).

Some challenges unique to interpreting include aural comprehension of different accents and dialects, and the ability to listen to the source language, process its meaning, and speak in the target language at the same time. González, Vásquez & Mikkelson, *supra*, at 295 ("[I]nterpreters must instantaneously arrive at a target language equivalent, while at the same time searching for further input."). The interpreter must also be highly efficient at attention sharing, as the efforts to listen and analyze the original speech and subsequently remember the content and produce the interpretation take place either in rapid succession (consecutive interpreting) or at the same time (simultaneous interpreting). Mikkelson, *supra*, at 70-76; González, Vásquez & Mikkelson, *supra*, at 19 ("[T]he interpreter must have the ability to orchestrate all of these linguistic tasks while interpreting in the simultaneous and consecutive and [sic] interpretation modes for persons speaking at rates of 200 words or more per minute."). Interpreters must develop pragmatic strategies unique to oral language mediation, including minimizing interference in information recovery and maximizing communication impact, and they must develop and maintain cross-cultural competence as well as an understanding of role boundaries. González, Vásquez & Mikkelson, *supra*, at 322 ("Court interpreters must adhere to certain legal standards that may not apply to any other type of interpreting or translating, and thus they are subject to unique demands."); Gile, *supra*, at 5.

Additionally, court interpreters must fully understand the standards of practice that govern their profession. The ethical codes under which interpreters operate vary significantly from those of translators, and within the interpreting profession, the code governing court interpreters has some unique features dictated by the demands of due process and legal equivalence. Mikkelson, *supra*, at 48 ("Regardless of what type of setting they work in, professional interpreters must uphold certain standards of practice, including accurate and faithful interpretation, confidentiality, and impartiality."); González, Vásquez & Mikkelson, *supra*, at 16-17; *Model Code of Professional Responsibility for Interpreters in the Judiciary*, *in* COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 197 (William E. Hewitt ed. 1995). "[W]hen interpreting legal terms or expressions, the court interpreter is concerned not only about the accuracy or adequacy of the interpretation, but also the comprehensibility and acceptability of the interpretation." Eva N.S. Ng, *The Tension Between Adequacy and Acceptability in Legal Interpreting and Translation*, *in* THE CRITICAL LINK 5: QUALITY IN INTERPRETING—A SHARED RESPONSIBILITY 37, 41 (Sandra Hale et al. eds., 2009). Court interpreters also should have knowledge of the basic procedures in a courtroom, as well as of diverse legal systems and comparative law and how legal terms are generally used. *See* Mikkelson, *supra*, at 34 ("As a court interpreter, it is essential ... to know how cases are processed in the courts ...."); González, Vásquez & Mikkelson, *supra*, at 95 ("[F]or court

interpreters to carry out their task competently they must be aware of how the legal system works.").

3. In contrast, translation involves taking written text and determining the best word or phrase to use in another language. Translation is not simultaneous or even consecutive, such as interpreting, and involves research and consultation with colleagues. Nolan, *supra*, at 3 ("The translator relies mainly on thorough research with background materials and dictionaries in order to produce the most accurate and readable written translation possible."). To properly accomplish this work, translators must be eloquent writers. Nolan, *supra*, at 3 ("The translator's activity is more like that of a writer, while the interpreter's performance is more like that of an actor."); Gile, *supra*, at 5 ("Technical translators are required to be able to write *publishable* texts, that is, to have *professional writing skills* ...."). Professional translators normally translate only into their mother tongue, and they therefore must have excellent writing skills in their native language, and must also have a solid passive knowledge of the language(s) from which they are translating. Gile, *supra*, at 2-3. Professional translators also may have their work reviewed by an editor or a reviser before it is submitted to the client (which, of course, is not available in interpreting). *Id.* at 104 ("The translator also tests the target-language version ... for editorial acceptability ....").

Further, translators generally do not need the quick mental reflexes required of interpreters, but must be adept at finding the appropriate word or expression—the *mot juste*—even if it requires

extensive research. *See* Nolan, *supra*, at 3 (indicating that "in practice, the translator is usually held to a higher standard of accuracy and completeness (including the ability to reproduce the style of the original), while the interpreter is expected to convey the essence of the message immediately" and that "[a] good translator will spend much time searching for the correct technical term or the right choice of words"). The cognitive processing demands in written translation are considered to be significantly lower than in consecutive or simultaneous interpreting. *See* Gile, *supra*, at 185 ("[P]rocessing capacity requirements are much lower in written translation than in either mode of interpretation."). It is true that translators, especially those who specialize in legal translation, must follow strict guidelines for dealing with legal documents. *Id.* But translators may devote all of their attention alternately to either reading and analysis of a source text or to writing the translation, with few or no time constraints under most working conditions. *Id.* at 186 ("[I]n translation there are no competing Efforts, and all available capacity can be devoted alternately to the Reading and analysis component ... and to the writing component ...."). These relatively discrete component processes of comprehension, transfer, and production stand in contrast to the multitasking that is required for either simultaneous or consecutive interpreting. *Id.* at 169, 180.[5]

---

[5] An illustration of the different demands facing translators and interpreters in the court environment is seen in Ng, *supra*,

4. Accordingly, the different skills that interpreters and translators employ provides further support for the distinction between these two disciplines, and indicates that translators cannot be encompassed within the meaning of the term "interpreter."

III. INTERPRETERS AND TRANSLATORS ARE SUBJECT TO DISTINCT PREPARATION AND ARE CONSIDERED DIFFERENT PROFESSIONS.

Further demonstrating the distinctions between the two disciplines, the training and education that interpreters and translators are likely to receive vary significantly. Among other things,

---

at 37-54. As illustrated therein, court interpreters in Hong Kong had been interpreting between English and Cantonese for decades when English was the official language of the colony. When Hong Kong reverted to Chinese sovereignty, English and Cantonese were adopted as dual official languages, and all laws were required to be published bilingually. The legal translators responsible for translating laws into Cantonese came up with very different solutions than those the interpreters had adopted previously. An example of one of the legal terms cited in the study is "burglary," which involves a number of different elements and requires an entire phrase in the Cantonese translation. However, because of the constraints on interpreting, interpreters had used a term that was much more concise than the phrase used by translators, as determined after extensive research, to convey the entire legal concept. This demonstrates that interpreters and translators use different methodologies and fundamental skills to accomplish their tasks of conveying the meaning of a word or phrase and should not be viewed interchangeably.

interpreters undergo different training from translators, and in the case of court interpreters, generally must pass a rigorous certification examination. Translators are not subject to the same training or qualifications in the United States. In addition, different associations generally represent the different professions, also demonstrating the distinction and providing further evidence that document translators should not be encompassed within the definition of "interpreters."

A. Interpreters and Translators Generally Have Separate Training Programs.

1. First, because interpreting and translating are different skills, many universities divide them into separate degree programs. For example, the Monterey Institute of International Studies offers M.A. degrees in conference interpreting,[6] translation and interpreting,[7] translation alone,[8] and translation

---

[6] Monterey Institute of Int'l Studies, MA In Conference Interpretation, http://www.miis.edu/academics/programs/conferenceinterpretation (last visited Dec. 3, 2011) ("Conference interpretation enables participants in a multinational meeting to communicate with one another in a seamless fashion ....").

[7] Monterey Institute of Int'l Studies, MA In Translation & Interpretation, http://www.miis.edu/academics/programs/translationinterpretation (last visited Dec. 3, 2011) ("Although interpretation and translation have much in common, the practice of each profession differs in the same way that written language differs from spoken.... Interpreters must be good public speakers who are adept at grasping meaning and solving complex linguistic problems quickly, whereas translators must be able to conduct thorough and meticulous research and produce accurate, camera-ready documents while adhering to

and localization management.[9] Other schools offer one but not the other, as in the case of Kent State University, which has graduate degree programs only in translation.[10]

2. In addition, interpreter and translator training programs differ significantly in the skills that they teach. The major steps in interpreting training include courses in: public speaking; accent reduction; consecutive and simultaneous interpreting; scientific and technical interpreting; political and economic interpreting; sight translation; and court interpreting, as well as a practicum in interpreting, oral exit examinations, and interpreting internship opportunities. *See, e.g.*, Monterey Institute of International Studies, Courses, http://www.miis.edu/academics/programs/translationinterpretation/courses (last visited Dec. 3, 2011). In contrast, translator training generally involves

---

tight deadlines.").

[8] Monterey Institute of International Studies, MA in Translation, http://www.miis.edu/academics/programs/translation (last visited Dec. 3, 2011) ("[A]nything that is written is a potential translation assignment.").

[9] Monterey Institute of International Studies, MA in Translation & Localization Management, http://www.miis.edu/academics/programs/translationlocalization (last visited Dec. 3, 2011) (combining translation and computer training).

[10] Kent State University, Dept. of Modern and Classical Language Studies, M.A. in Translation, http://www.kent.edu/mcls/graduate/ma_translation.cfm (last visited Dec. 3, 2011); Kent State University, Dept. of Modern and Classical Language Studies, PhD in Translation, http://appling.kent.edu/graduate/phd.cfm (last visited Dec. 3, 2011).

course in: literary translation; legal-commercial translation; scientific and technical translation; computer assisted and machine translation; desktop publishing; terminology management; and translation as a profession, as well as a translation thesis project, specialized translation depending on language combination and market, a practicum in translation, written exit exams, and translation internship opportunities. *See, e.g.*, Kent State University, Dept. of Modern and Classical Languages, M.A. in Translation, http://www.kent.edu/mcls/graduate/ma_translation.cfm (last visited Dec. 3, 2011) (listing program requirements for Master of Arts Specializing in Translation). The different courses of training demonstrate that interpreter training focuses on developing oral skills, as opposed to the development of written translation skills for translating training.

B. United States Court Interpreters Must Be Certified Through A Rigorous Examination.

Moreover, further demonstrating the distinction between interpreters and translators in the language services industry, especially in the legal context, United States court interpreters generally must be certified at either the federal or the state levels. Translators are not legally required to be certified, or to pass any sort of certification or proficiency test.[11]

1. The federal certification exam is generally required before anyone may be certified as an interpreter in the United States federal courts. 28 U.S.C. § 1827; Gonzalez, Vasquez & Mikkelson at 20, 523-25; Federal Court Interpreter Certification Examination ("FCICE") Information, Frequently Asked Questions, http://www.ncsconline.org/d_research/fcice_exam/faq.htm (last visited Dec. 3, 2011) ("Is it possible to become federally certified without taking this examination? No. There are no alternative examinations or qualifications for becoming federally certified."). "Only in a case in which no certified interpreter is reasonably available ... may the services of otherwise qualified interpreters be used." 28 U.S.C. § 1827(b)(2).

---

[11] Notably, the best translators do pass rigorous certification exams conducted by the American Translators Association, which are fundamentally different from exams administered for the certification of court interpreters. *See infra* at 32-33.

The United States Courts generally recognize three categories of "Interpreters": (1) Certified Interpreters; (2) Professionally Qualified Interpreters; and (3) Language Skilled/Ad Hoc Interpreters. *See* United States Federal Courts, Three Categories of Interpreters, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts/CourtInterpreters/InterpreterCategories.aspx (last visited Dec. 3, 2011). "Certified interpreters have passed the Administrative Office certification examination." *Id.* "In languages other than Spanish, Navajo and Haitian-Creole, interpreters are designated as: professionally qualified [;] and language skilled." *Id.* Professionally qualified interpreters must meet sufficient documentation and authentication requirements, and must have passed the United States Department of State conference or seminar interpreter test, passed the United Nations interpreter test, or be a member of the Association Internationale des Interpretes de Conference ("AIIC") or The American Association of Language Specialists ("TAALS"). *Id.* "An interpreter who does not qualify as a professionally qualified interpreter, but who can demonstrate to the satisfaction of the court the ability to interpret court proceedings from English to a designated language and from that language into English, will be classified as a language skilled/ad hoc interpreter." *Id.*

Passing the federal exam is an arduous process administered over a two-year period. FCICE Examinee Handbook, at 3, § 1.6 (2011), *available at* http://www.ncsconline.org/d_research/fcice_exam/2011approvedbyAO-Online.pdf ("The FCICE is a two-

phase examination of language proficiency and interpretation performance ... administered in alternate years."). [12] The exam involves a written component as a screening device to qualify promising candidates for the oral exam, but the only translation involved in the exams is a multiple-choice section in which candidates choose the best translation of a term or phrase from four different choices. *Id.* at 17, § 3.1. The oral component then consists of sight translation both into and out of English, consecutive interpreting of testimony (questions in English, answers in the foreign language), and simultaneous interpreting (English into the foreign language) of typical courtroom discourse. *Id.* at 35, § 4.1.

In addition, many states also require certification of interpreters. [13] The National Center for State Courts has developed a test bank for certifying court interpreters in many different languages. Certain state exams involve written translation, but generally only for the Spanish examination, and even then only involving the

---

[12] The federal exam is currently available only in the Spanish-English combination.

[13] At least 40 states, as well as the District of Columbia, have some form of Court Interpreter Program. *See* National Center for State Courts, Contact Persons for State and Federal Interpreter Programs, http://www.ncsconline.org/D_Research/CIConsortContactspage.html (last visited Dec. 3, 2011). Twenty-three states are members of the Consortium for State Court Interpreter Certification, which designs tests for interpreters and makes them available to member states, and which is administered by the National Center for State Courts. *See* Mary Phelan, THE INTERPRETER'S RESOURCE 31 (2001).

translation of a short paragraph. Consortium for State Court Interpreter Certification, Overview of the Written Examination for Candidates, (Jan. 2005), *available at* http://www.ncsconline.org/D_Research/CourtInterp/Web%2010%20Overview%20of%20the%20Written%20Exam.pdf. The state exams place heavy emphasis on the oral component, generally requiring sight translation both into and out of English, consecutive interpreting of testimony (questions in English, answers in the foreign language), and simultaneous interpreting (English into a foreign language) of typical courtroom discourse, similar to the federal exam. Consortium for State Court Interpreter Certification, Overview of the Oral Performance Examination for Prospective Court Interpreters (July 2005), *available at* http://www.csconline.org/D_Research/CourtInterp/Web%207%20Overview%20of%20the%20Oral%20Exam.pdf.

2. By contrast, there is no certification examination requirement for legal translators in the United States. However, there are non-governmental certification and proficiency examinations offered for translation. For example, a certification exam for translators is administered by the American Translators Association ("ATA"). American Translators Association, ATA Certification Program, Certification Exam, http://www.atanet.org/certification/aboutexams_overview.php (last visited Dec. 3, 2011). Candidates for certification take a standardized exam consisting of three short texts: one on a general subject that is required for everyone; one on a medical or technical subject; and one on a legal, business, or financial topic. *Id.* Candidates

choose only one of the latter two to translate. *Id.* While certification is required for active ATA membership (provided there is an exam in the translator's language combination), it is not legally mandated to work as a translator. In other words, a translator's membership in the ATA is not a prerequisite to becoming a "translator" for a court at either the state or federal level.

3. Finally, other sectors of the language services professions have proficiency exams and qualifications for working as employees or contractors of a given institution. Examples include the United States Department of State, [14] the European Parliament,[15] and the United Nations.[16] In addition, ILR, as noted *supra* at 12-13, 17, is an

---

[14] U.S. Department of State Office of Language Services, Interpreting Division, http://languageservices.state.gov/Content/documents/LS%20information%20for%20interpreters.doc (last visited Dec. 3, 2011) (listing requirements for U.S. State Department interpreters examination); U.S. Department of State Office of Language Services, Translating Division http://languageservices.state.gov/content.asp?content_id=270&menu_id=108 (last visited Dec. 3, 2011) (describing process for becoming a language translator).

[15] European Personnel Selection Office, Ongoing Competitions – Translators/Interpreters, http://europa.eu/epso/apply/on_going_compet/tra/index_en.htm#chapter10 (last visited Dec. 3, 2011).

[16] United Nations, Notice – 2011 Competitive Examinations for English-Language Interpreters, at ¶ 7 (2011), *available at* http:// www.un.org/Depts/OHRM/examin/11einot.doc; United Nations, Notice – 2010 Competitive Examination for French-Language Translators/Précis-Writers, at ¶ 9 (2010), *available at* http://www.un.org/Depts/OHRM/ examin/10ftrnote.doc.

organization representing multiple federal agencies in which foreign languages are used in federal government employment. [17] The translation and interpreting proficiency exams administered by these institutions are independent from each other, and different administrative divisions and career tracks have been established for the provision of translation and interpreting services in these institutions.

In the private sector as well, certain language service companies have internal tests to qualify the interpreters and translators who work as contractors for them. *See, e.g.*, Language Line Services, Our Company, http://www.languageline.com/page/our_company (last visited Dec. 3, 2011); Lion-Bridge Technologies, Inc., Legal and Court Interpretation, http://en-us.lionbridge.com/Interpretation.aspx?pageid=1334&LangType=1033 (last visited Dec. 3, 2011); CyraCom, LLC, Interpreter Skills Assessment, http://www.cyracom.com/Training/ISA (last visited Dec. 3, 2011).

However, it is important to clarify that even if a person is certified as an interpreter through one of these various government methods, this will not qualify that person as a certified interpreter in the federal courts. Even certification as an interpreter or translator by a federal agency will not exempt that person from the two-year qualification examination as a federal court interpreter. It is only through the federal court exam that one can become properly

---

[17] Interagency Language Roundtable, http://www.govtilr.org/index.htm (last visited Dec. 3, 2011).

certified as a court interpreter. FCICE Examination Information, Frequently Asked Questions, http://www.ncsconline.org/d_research/fcice_exam/faq.htm (last visited Dec. 3, 2011). This critical fact—that only by passing the federal exam can a person be certified as an interpreter in federal court—demonstrates even further the notion that an "interpreter" under federal law is not the equivalent of a person performing document translation services.

C. Different Professional Associations Generally Represent Interpreters and Translators.

In addition to the education and certification processes distinguishing between interpreters and translators, there are a number of professional associations that distinguish between the two disciplines and represent either interpreters or translators exclusively (or at least primarily).

For example, the AIIC represents only conference interpreters.[18] The International Medical Interpreters Association (IMIA) encompasses only medical interpreters.[19] In California, interpreters are represented by the California Federation of Interpreters (CFI),[20] while translators are primarily

---

[18] AIIC – Professional Conference Interpreters Worldwide, http://aiic.net (last visited Dec. 3, 2011).

[19] Int'l Medical Interpreters Ass'n, http:// imiaweb.org (last visited Dec. 3, 2011).

[20] CFI – California Federation of Interpreters, http://www.calinterpreters.org (last visited Dec. 3, 2011).

represented by the Northern California Translators Association (NCTA).[21]

Further, while there are other organizations that represent both types of practitioners, even these organizations are usually weighted towards one or the other. Both NAJIT and TAALS focus mainly on interpreters while occasionally addressing the needs of translators. Likewise, the ATA and the International Federation of Translators (FIT) deal primarily with the translation profession, though their respective memberships include interpreters and their conferences may feature certain papers on interpreting. But regardless of whether there is some overlapping professional representation, it is generally accepted in the language services industry that interpreting and translation are two separate professions.

D. Interpreting and Translation Research Also Demonstrates the Distinctions.

Finally, research that has been done on interpreting and translation also demonstrates the distinctions between the two disciplines. The discipline of interpreting studies focuses on many aspects unique to interpreting, such as simultaneity, split attention, anticipation, pauses and synchrony, and time lag, and has its own journals. *See* Franz Pöchhacker, INTRODUCING INTERPRETING STUDIES (2004). Indeed, the approaches to research on

---

[21] Northern California Translators Ass'n, http://ncta.org (last visited Dec. 3, 2011).

translation and interpreting are so different that it is unusual for a single researcher to conduct research on both.

Empirical literature in cognitive and linguistic sciences demonstrates that interpreting and translation are accomplished by different cognitive processes. For example, the compendium COGNITIVE PROCESSES IN TRANSLATION AND INTERPRETING (Joseph Danks, et al. eds., 1997) has separate chapters reporting research on translation processes and other chapters reporting research on interpreting. These studies indicate different cognitive information processing models of translation and interpreting, with very different mental components and separate connections among the components. *Compare* J. Danks & J. Griffin, "Reading and Translation: A Psycholinguistic Perspective," *id.* at 161-75 (study of cognitive processes in translation), *with* B. Moser-Mercer, "Beyond Curiosity: Can Interpreting Research Meet the Challenge?", *id.* at 176-95 (study of cognitive processes in interpretation). *See also* TRANSLATION AND COGNITION (Gregory Shreve & Erik Anoleone eds., 2010) (compiling research, including neuro-imaging data, and indicating a dichotomy between the cognitive process models of translation and interpreting).

Thus, along with the different training methods and professional representations of interpreters and translators, the empirical research literature also indicates a distinction between the translation of written text and the interpretation of oral language, which are performed by different sets

of cognitive processes to very different behavioral tasks.

CONCLUSION

For the foregoing reasons, the term "interpreter" in 28 U.S.C. § 1920(6) should be held to not encompass document translators.

Respectfully submitted,

M. Scott Barnard
Counsel of Record
Scott T. Williams
Patrick G. O'Brien
John B. Capehart
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1700 Pacific Avenue
Suite 4100
Dallas, Texas 75201
(214) 969-2800

December 5, 2011

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
DEC 5 - 2011
OFFICE OF THE CLERK

No. 10-1472

In the Supreme Court of the United States

KOUICHI TANIGUCHI,

Petitioner,

v.

KAN PACIFIC SAIPAN, LTD.,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION OF JUDICIARY INTERPRETERS AND TRANSLATORS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DANIEL R. ORTIZ
JAMES E. RYAN
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

MARK T. STANCIL*
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411
Washington, DC 20006
(202) 775-4500
mstancil@robbinsrussell.com

**Counsel of Record*

[Additional Counsel Listed On Inside Cover]

Library of Congress
Law Library

JOHN P. ELWOOD
Vinson & Elkins LLP
2200 Pennsylvania Ave., N.W., Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

DAVID T. GOLDBERG
Donahue & Goldberg, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. Interpreters And Translators Are Different Occupations, And The Professions Maintain A Clear Distinction Between The Two 5

II. Congress, The Executive, And The Courts Consistently Distinguish Between Interpreters And Translators 12

III. Translation Costs Are Disproportionately Greater, More Uncertain, And More Difficult To Administer Than Interpretation Costs 17

A. Including Translation Fees With "Interpreter" Fees Would Substantially Increase Awardable Court Costs Under 28 U.S.C. § 1920 17

TABLE OF CONTENTS—Cont'd

Page

B. Awarding Translation Costs Would Impose A Substantial Burden On District Courts 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Conn v. *Zakharov*,
No. CV-1:09-0760, 2010 WL 2293133
(N.D. Ohio June 4, 2010) 18

Corning Glass Works v. *Brennan*,
417 U.S. 188 (1974) 4

Cuadrado-Ramos v. *Commonwealth of Puerto Rico*, No. CV-09-1369, 2010 WL 1416016
(D.P.R. Mar. 31, 2010) 20

E & J Gallo Winery v. *Andina Licores S.A.*,
No. CV-F-05-0101 AWI LJO, 2007 WL
1589546 (E.D. Cal. June 1, 2007) 18 22

Extra Equipamentos E Exportacao Ltda. v. *Case Corp.*,
541 F.3d 719 (7th Cir. 2008) ..... *passim*

Gabriel Technologies Corp. v. *Qualcomm, Inc.*,
No. CV-08-1992, 2010 WL 3718848 (S.D.
Cal. Sept. 20, 2010) 17, 18, 19

Hynix Semiconductor Inc. v. *Rambus Inc.*,
697 F.Supp. 2d 1139 (N.D. Cal. 2010) 22

Lopez Quinones v. *Puerto Rico National Guard*,
715 F.Supp.2d 233 (D.P.R. 2010) 19

Louisiana Pub. Serv. Comm'n v. *F.C.C.*,
476 U.S. 355 (1986) 4

TABLE OF AUTHORITIES–Cont'd

Page(s)

Mayo Found. for Med. Educ. & Research v. *United States*,
131 S. Ct. 704 (2011) 10

Melendez-Benitez v. *United States*,
498 F.Supp.2d 460 (D.P.R. 2007) 20

Ortho-McNeil Pharm., Inc. v. *Mylan Laboraties Inc.*,
No. 1:02CV32, 2008 WL 7384877 (N.D. W.Va. Aug. 18, 2008), aff'd in part, vacated in part, 569 F.3d 1353 (Fed. Cir. 2009) ..... *passim*

Osorio v. *Dole Food Co.*,
No. 07-22693-CIV, 2010 WL 3212065 (S.D. Fla. July 7, 2010) 19, 23

Ricoh Corp. v. *Pitney Bowes Inc.*,
Civ. No. 02-5639 (GEB), 2007 WL 1852553 (D.N.J. June 26, 2007) 21, 22

Rodriguez-Garcia v. *Municipality of Caguas*,
787 F.Supp.2d 135 (D.P.R. 2011) 18, 20

Slagenweit v. *Slagenweit*,
63 F.3d 719 (8th Cir. 1995) 21

Studiengesellschaft Kohle mbH v. *Eastman Kodak Co.*,
713 F.2d 128 (5th Cir. 1983) 21

Tilton v. *Capital Cities/ABC, Inc.*,
115 F.3d 1471 (10th Cir. 1997) 21

Trading Technologies Int'l v. *ESpeed, Inc.*,
750 F.Supp.2d 962 (N.D. Ill. 2010) 17 19

TABLE OF AUTHORITIES–Cont'd

Page(s)

United States v. *Menasche*,
348 U.S. 529 (1955) 14

Williams v. *R.W. Cannon, Inc.*,
657 F.Supp.2d 1302 (S.D. Fla. 2009) 20

Williams v. *Taylor*,
529 U.S. 362 (2000) 14

Statutes & Rules

7 U.S.C. § 2242b 13

8 U.S.C. § 1375b 13

8 U.S.C. § 1555 14

10 U.S.C. § 828 13

10 U.S.C. § 1596b 14

10 U.S.C. § 948*l*(b) 13

20 U.S.C. § 1400 20

22 U.S.C. § 2695a(a) 14

22 U.S.C. § 8222 14

26 U.S.C. § 6672 20

28 U.S.C. § 530(I) 14

28 U.S.C. § 1827 13

28 U.S.C. § 1827(d)(1) 12

28 U.S.C. § 1827(d)(2) 13

28 U.S.C. § 1827(*l*) 13

TABLE OF AUTHORITIES–Cont'd

Page(s)

28 U.S.C. § 1920 ..... 17, 19

28 U.S.C. § 1920(6) 2, 3, 4, 9

42 U.S.C. § 1983 20

Court Interpreters Act,
Pub. L. No. 95-539 (1978) 9

U.S. Sup. Ct. R. 31 16

Other Authorities

American Translators Association Certification Program, *Certification Exam*, Available at http://www.atanet.org/certification/aboutexams_overview.php. 10, 11, 12

American Translators Association, *Translation: Getting It Right: A Guide to Buying Translation*, Available at http://www.atanet.org/docs/Getting_it_right.pdf 5, 6

Denis Sánchez Calderaro, *Considerations on Teaching Translation*, 2 Translation Journal (1998), Available at http://translationjournal.net/journal/05educ.htm. 8

John F. Fargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567 20

TABLE OF AUTHORITIES–Cont'd

Page(s)

Federal Court Interpreter Certification Examination Program, *Federal Court Interpreter Certification Examination for Spanish/English: Examinee Handbook* (2011), Available at http://www.ncsconline.org/d_research/fcice_exam/2011approvedbyAO-Online.pdf. 10

Daniel Gile, *Testing the Effort Models' Tightrope Hypothesis in Simultaneous Interpreting—A Contribution*, 23 Journal of Linguistics (1999) 8

Roseann D. Gonzalez, et al., *Fundamentals of Court Interpretation: Theory, Policy, and Practice* (2001) 7, 8, 9

Guide to Judiciary Policy, Vol. 5: Court Interpreting (2011) 3, 10, 11

International Association of Professional Translators and Interpreters, *Objectives*, Available at http://www.aipti.org/eng/objetives/. 6

Matthew S. Klimow, U.S. State Department, *Language Services Information for Translators*, Available at http://languageservices.state.gov/Content/documents/LS%20information%20for%20translators.pdf. 8, 15

TABLE OF AUTHORITIES–Cont'd

Page(s)

Judith Kenigson Kristy, *Translators and Interpreters: Cut From The Same Cloth?*, Vol. XVI, No. 1 Proteus: The Newsletter of the National Association of Judiciary Interpreters 1, 7 (2007), Available at http://languageaccess.us/Documents%20and%20Links/Translators%20&%20Interpreters.pdf.....22

Minua Liu, *Working Memory and Expertise in Simultaneous Interpreting*, 6 Interpreting 19 (2004).....6, 7, 8, 9

National Association of Judiciary Interpreters and Translators, *Frequently Asked Questions about Court and Legal Interpreting and Translating*, Available at http://www.najit.org/certification/faq.php. 5, 6, 8

Heather Pantoga, *Injustice in Any Language: The Need for Improved Standards Governing Courtroom Interpretation in Wisconsin*, 82 Marq. L. Rev. 601 (1998-1999) 6

Parent Teacher Association, *About PTA*, Available at http://www.pta.org/about_pta.asp.....5

The American Association of Language Specialists, *Standard of Professional Practice for Conference Interpreters and Translators*, Available at http://www.taals.net/standards.php. 5, 6

TABLE OF AUTHORITIES–Cont'd

Page(s)

U.S. Army, *Careers & Jobs*, Available at http://www.goarmy.com/careers-and-jobs/browse-career-and-job categories/intelligence-and-combat-support/interpreter-translator.html 16

U.S. Courts, *Federal Court Interpreters*, Available at http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts/CourtInterpreters.aspx.....7

U.S. State Dep't Language Servs., *Applications Q&A*, Available at http://languageservices.state.gov/content.asp?Content_id=174&menu_id=108.....11

U.S. State Dep't Language Servs., *Interpreting*, Available at http://languageservices.state.gov/content.asp?content_id=178&menu_id=110.....15

U.S. State Dep't Language Servs., *Translating*, Available at http://languageservices.state.gov/content.asp?content_id=177&menu_id=110.....15

United States Bureau of Labor Statistics, *Interpreters and Translators, Occupational Handbook* (2010-2011), Available at http://www.bls.gov/oco/pdf/ocos175.pdf.....7, 8, 9, 16

TABLE OF AUTHORITIES–Cont'd

Page(s)

United States Courts, *Current Fees for Contract Interpreters*, Available at http://www.uscourts.gov/FederalCourts/UnderstandingtheFederal-Courts/DistrictCourts/CourtInterpreters/ContractInterpretersFees.aspx 22

United States Courts, *Interpreter Categories*, Available at http://www.uscourts.gov/FederalCourts/UnderstandingtheFederal-Courts/DistrictCourts/CourtInterpreters/InterpreterCategories.aspx. 11

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Judiciary Interpreters and Translators (NAJIT) was founded in 1978 to (1) build professionalism among interpreters and translators working in the courts and other judicial and law-enforcement settings; (2) advocate in support of legal interpreter and translator programs; and (3) educate the public about the need for qualified and well-trained professional judiciary interpreters and translators.

NAJIT's mission is to promote quality services in the field of legal interpreting and translating. NAJIT's members play a critical role in ensuring due process, equal protection, and equal access for non-English or limited-English-proficient individuals who interact with the judicial system. NAJIT's membership includes more than 1200 language professionals, including practicing spoken-language and American Sign Language (ASL) interpreters and translators who work in various areas of the state and federal judiciary, as well as those who interpret or translate in other settings.

An important part of NAJIT's mission is to offer the public an accurate understanding of the

---

[1] No counsel for a party wrote this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Both petitioner and respondents have filed blanket consents to amicus briefs; the consents are reflected on the Court's docket.

important differences between interpreters and translators. Misconstruction of 28 U.S.C. § 1920(6) muddles this distinction and risks that interpreters or translators may be expected to have skills outside of their specialties. In short, the distinction between translators and interpreters is well-known within the language-professional industry—and particularly among those who work in the judicial arena—and NAJIT is keenly interested in educating the public (and the Court) regarding this important issue.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In enacting the Court Interpreters Act (which included 28 U.S.C. § 1920(6)), Congress provided that the losing party in a lawsuit may be required to reimburse the winning party for "compensation for interpreters." The Ninth Circuit erroneously held that "compensation for interpreters" included compensation for translators.

Petitioner's brief explains how, as a matter of statutory interpretation, the Ninth Circuit incorrectly construed the meaning of "interpreters" as used in 28 U.S.C. § 1920(6). NAJIT does not seek to re-plow that ground here. Rather, this brief seeks to contribute to the Court's understanding of the statute by explaining how the terms "interpreter" and "translator" are understood by language professionals, and by describing the real-world, practical differences between the two fields.

I. At its most basic level, the distinction between interpreters and translators is simple: Interpreters speak, while translators write. As a result,

interpreters must possess different skills from those of translators. Interpreters must have the "analytical skills, mental dexterity" and "exceptional memory" necessary to interpret spoken words from one language into another in real time. The act of translating a document from one language to another, however, is a more research-oriented, meticulous process.

These differences are recognized by linguists and the judicial system alike. They lie at the foundation of the judiciary's certification procedures for interpreters, and explain why the Administrative Office of United States Courts recognizes that "[t]he Court Interpreters Act does not address written translation requirements." See *Guide to Judiciary Policy*, Vol. 5: Court Interpreting, §550.20.10 (2011).

II. The difference between interpreters and translators is recognized in many other statutes beyond § 1920(6). The U.S. Code consistently uses the words "interpret" and "translate" in the same manner as language professionals. A different understanding of § 1920(6) would therefore require an exception to otherwise uniform use of these terms throughout the Code. It would also be contrary to usage by the State Department, the Department of Defense, the Bureau of Labor Statistics, and even one of this Court's rules.

III. Translation and interpretation are not just theoretically distinct, but practically different as well. Interpretation is required only for live testimony conducted before or during trial, whereas translation may apply to any written documents used during the course of litigation. Translation

costs are therefore limited only by the number of documents in a particular case. Allowing cost-shifting for such large amounts would require still further litigation over what documents are eligible for fee shifting, and whether incurred translation costs are reasonable. The decision to extend § 1920(6) to translation fees would thus have significant policy implications, and is best left to a clear directive from Congress.

ARGUMENT

"[T]echnical terms of art should be interpreted by reference to the trade or industry to which they apply." *Louisiana Pub. Serv. Comm'n* v. *F.C.C.*, 476 U.S. 355, 372 (1986); *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 201 (1974). Trade organizations and the United States Government, in a variety of statutes, regulations, and one of this Court's rules, recognize that interpreters and translators are members of two different professions engaged in different media.

Practical differences suggest different treatment of interpreting and translating as well. Unlike interpreting, translating occurs during document production and review, and occurs outside the direct view of the court and other parties. Translation costs are therefore dramatically more difficult to monitor and control.

I. Interpreters And Translators Are Different Occupations, And The Professions Maintain A Clear Distinction Between The Two

Interpreters speak; translators write. American Translators Association, *Translation: Getting It Right: A Guide to Buying Translation* 3 (*Translation: Getting It Right*).[2] While an outsider may conflate the two, interpreters and translators are different professions, as the professionals themselves and their associations recognize. See, *e.g.*, *ibid.*; National Association of Judiciary Interpreters and Translators, *Frequently Asked Questions about Court and Legal Interpreting and Translating* (*NAJIT FAQ*);[3] The American Association of Language Specialists, *Standard of Professional Practice for Conference Interpreters and Translators*.[4]

To be sure, interpreters and translators often belong to the same organizations, but that does not eliminate the distinction between the two any more than the existence of the PTA eliminates the distinction between parents and teachers. Cf. Parent Teacher Association, *About PTA*.[5] For example, both judiciary interpreters and judiciary translators may join NAJIT. *NAJIT FAQ*. The association, however, explicitly separates those professions, recognizing that interpreters render spoken communications into

---

[2] Available at http://www.atanet.org/docs/Getting_it_right.pdf.

[3] Available at http://www.najit.org/certification/faq.php.

[4] Available at http://www.taals.net/standards.php.

[5] Available at http://www.pta.org/about_pta.asp.

a different language, while translators render written communications into a different language. *Ibid.*

The American Translators Association, the largest professional association of translators and interpreters in the United States, recognizes the same distinction: "Translators write, interpreters speak." *Translation: Getting It Right* 3. International associations of interpreters and translators likewise appreciate the difference between the two professions. See, *e.g.*, The American Association of Language Specialists, *Standard of Professional Practice for Conference Interpreters and Translators* (noting that interpreters work with oral communication while translators work with written documents);[6] see generally International Association of Professional Translators and Interpreters, *Objectives.*[7]

Working in different media necessitates the development of distinct, specialized skills for each profession. The interpreter listens to the original spoken communication and then renders the communication orally in another language. See Minua Liu, *Working Memory and Expertise in Simultaneous Interpreting*, 6 Interpreting 19, 19 (2004); Heather Pantoga, *Injustice in Any Language: The Need for Improved Standards Governing Courtroom Interpretation in Wisconsin*, 82 Marq. L. Rev. 601, 601–602 (1998-1999). That process, as the Bureau of Labor Statistics has observed, "requires

---

[6] Available at http://www.taals.net/standards.php.

[7] Available at http://www.aipti.org/eng/objetives/.

that one pay attention carefully, understand what is communicated in both languages, and express thoughts and ideas clearly." United States Bureau of Labor Statistics, *Interpreters and Translators, Occupational Handbook* 1 (2010-2011) (*Occupational Handbook*).[8] Interpreters must therefore possess strong "analytical skills, mental dexterity, and an exceptional memory." *Ibid.*

The Administrator of the United States Courts agrees, noting that interpreters must be "able to accurately and idiomatically turn the message from the source language into the receptor language without any additions, omissions or other misleading factors that alter the intended meaning of the message from the speaker." U.S. Courts, *Federal Court Interpreters*.[9] The court interpreter must be "adept at simultaneous interpretation" and "able to communicate orally including appropriate delivery and poise." *Ibid.*

In addition, the ability to perform simultaneous interpretation requires specialized cognitive abilities. Liu, 6 *Interpreting* at 19–20; see generally Roseann D. Gonzalez, et al., *Fundamentals of Court Interpretation: Theory, Policy, and Practice* 315–358 (2001) (discussing psychological models of interpretation). The interpreter must express communication A, just heard in the source language, in the target language while listening to the incoming communication B. While the interpreter

---

[8] Available at http://www.bls.gov/oco/pdf/ocos175.pdf.

[9] Available at http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts/CourtInterpreters.aspx.

continues to express communication A, he must temporarily hold the meaning of communication B in his memory. Liu, 6 Interpreting at 19–20. Such an instantaneous and continuous process requires excellent short-term memory and cognitive discipline. *Ibid.*; Daniel Gile, *Testing the Effort Models' Tightrope Hypothesis in Simultaneous Interpreting—A Contribution*, 23 Journal of Linguistics 153, 159 (1999). Indeed, "the interpreter is engaged in an ongoing process of problem solving and decision making." Gonzales, et al., at 314.

Translators, by contrast, read written communications and then write those communications in a different language. *NAJIT FAQ.* Because they deal with written communication rather than spoken communication, translators must develop skills distinct from interpreters. Translators do not require specialized oral skills to perform their job; rather, they "must have excellent writing and analytical ability." *Occupational Handbook* 1; see also Matthew S. Klimow, U.S. State Department, *Language Services Information for Translators* 2 ("An applicant must be able to write the target language well at an educated, native level with reasonable speed in a variety of styles.").[10]

In addition, translators must have good editing and research skills. *Occupational Handbook* 1; Denis Sánchez Calderaro, *Considerations on Teaching*

---

[10] Available at http://languageservices.state.gov/Content/documents/LS%20information%20for%20translators.pdf.

Translation, 2 Translation Journal (1998) (online).[11] Translators must know how to discover and convey a communication's nuance. And whereas interpreters render communications from one language to another almost instantaneously, "[t]ranslators have time to reflect and craft their output." Gonzalez, et al., at 295; see Liu, 6 Interpreting at 19–20. Indeed, a common saying among language professionals is that a translation is never finished, it is merely abandoned.

Beyond general research skills, translators must have computer-related skills, as "nearly all translation work is done on a computer, and most assignments are received and submitted electronically." *Occupational Handbook* 1. They have to be able to conduct Internet-based research, and while translating be able to utilize "specialized dictionaries and glossaries." *Ibid.*

In addition to different skill sets, interpreters and translators undergo different accreditation procedures. While the United States Court system certifies interpreters, there is no similar procedure for translators. This difference is not coincidental. The Court Interpreters Act (enacting 28 U.S.C. § 1920(6)), directed the Administrative Office of the United States Courts to establish a program to formally "prescribe, determine, and certify" the qualifications of "interpreters." Court Interpreters Act, Pub. L. No. 95-539 § 1827(b) (1978).

---

[11] Available at http://translationjournal.net/journal/05educ.htm.

However, "[t]he Court Interpreters Act does not address written translation requirements." See, *Guide to Judiciary Policy, Vol. 5: Court Interpreting*, §550.20.10 (2011). The Administrative Office's definition of "interpreter" for purposes of the Act is necessary for administration of the Court Interpreters system, and therefore should be given deference. Cf. *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 713 (2011).

Not only do different organizations accredit interpreters and translators, the accreditation exams also test different skills. As one would expect, interpreters must pass oral examinations. See, *e.g.*, Federal Court Interpreter Certification Examination Program, *Federal Court Interpreter Certification Examination for Spanish/English: Examinee Handbook* 3 (2011) (*Court Interpreter Certification*).[12] Translators, by contrast, must pass written examinations. See, *e.g.*, American Translators Association Certification Program, *Certification Exam*.[13]

To become a certified interpreter through the Administrative Office for the U.S. Courts, one must pass an oral examination that "measures a candidate's ability to accurately perform simultaneous as well as consecutive interpretation and sight transla-

---

[12] Available at http://www.ncsconline.org/d_research/fcice_exam/2011approvedbyAO-Online.pdf.

[13] Available at http://www.atanet.org/certification/aboutexams_overview.php.

tions[14] as encountered in the federal courts." United States Courts, *Interpreter Categories*.[15] Similarly, to become a staff interpreter at the State Department, one must first pass "a mini-interpreting test over the phone." U.S. State Dep't Language Servs., *Applications Q&A*.[16] If the candidate passes, she is invited to sit for the formal, hour-long oral interpretation test. *Ibid.* "Dictionaries and glossaries are not allowed." *Ibid.*

Translators, on the other hand, are not subject to an interpreting test or oral interview. *State Department Q&A*. Translators applying to the State Department, for example, must submit a written application and pass a formal translation test consisting of translating several written passages. *Ibid.* Similarly, in an American Translators Association certification exam, the candidate translates writing rather than engaging in oral interpretation. American Translators Association Certification Program, *Certification Exam*.[17] Additionally, unlike

---

[14] As noted by the *Guide to Judiciary Policy*, sight translation is "a hybrid of translation and interpretation that requires the interpreter to first review the original written text, then render it orally into the other language." *Guide to Judiciary Policy, Vol. 5: Court Interpreting* § 140(o) (2011).

[15] Available at http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts/CourtInterpreters/InterpreterCategories.aspx.

[16] Available at http://languageservices.state.gov/content.asp?Content_id=174&menu_id=108.

[17] Available at http://www.atanet.org/certification/aboutexams_overview.php.

in interpretation exams, candidates may use dictionaries and other materials. *Ibid.*

II. Congress, The Executive, And The Courts Consistently Distinguish Between Interpreters And Translators

All three branches of the federal government consistently distinguish between interpreters and translators. Throughout the U.S. Code, Congress uses interpreter when referring to oral interpretation and translator when referring to written translation. Likewise, the Executive branch consistently uses the terms interpreter and translator in the same way. In particular, the State Department, the Department of Defense, and the Bureau of Labor Statistics all distinguish between the roles of interpreters and translators when defining the professions. Even this Court in its own rules uses the term translator to refer to written translation.

1. Throughout the U.S. Code, Congress uses interpreters and translators, individually and together, in a manner that consistently recognizes the crucial distinction between the two roles.

Congress consistently uses the term interpreter to refer to spoken interpretation. For example, other parts of the Court Interpreters Act codified in Title 28 specifically contemplate an interpreter conducting real-time, spoken interpretation in the courtroom. The Code states that "[t]he presiding judicial officer * * * shall utilize the services of the most available certified interpreter * * * [when a party or witness] speaks only or primarily a language other than the English language." 28 U.S.C. § 1827(d)(1); see also,

28 U.S.C. § 1827(d)(2) ("[The judge] shall determine whether to require the electronic sound recording of a judicial proceeding in which an interpreter is used."); 28 U.S.C. § 1827(*l*) ("[T]he [judge] may appoint a certified * * * sign language interpreter to provide services."). These statutory provisions clearly contemplate in-court oral interpretation of a real-time hearing rather than the out-of-court translation of written documents. It is particularly telling that Congress uses the term interpreter when referring to sign language interpretation. Sign language is an example of an interpretation that can only occur in a real-time, oral proceeding.

Likewise, the term interpreter is consistently used elsewhere in the Code to refer to real-time, oral interpretation. In Title 10, for example, the term repeatedly appears in reference to real-time, oral interpretation. 10 U.S.C. § 828 ("[T]he convening authority of a court-martial * * * may detail or employ interpreters who shall interpret for the court."); 10 U.S.C. § 948*l*(b) (referring to "interpreters who shall interpret for the military commission, and * * * for trial counsel and defense counsel"). Here, as in 28 U.S.C. § 1827, Congress is plainly referring to oral interpretation, confirming that Congress knows the difference between interpreters and translators.

The terms translation and translator, by contrast, are used consistently in the Code to refer to out-of-court, written translation. 7 U.S.C. § 2242b ("[F]unds * * * may be used for translation of publications * * * into foreign languages."); 8 U.S.C. § 1375b ("[T]he Secretary of State shall translate the information pamphlet * * * into all relevant foreign

languages."); 22 U.S.C. § 8222 ("The Secretary shall continue to expand the timely translation of the applicable parts of the Country Reports on Human Rights Practices.").

In addition, when Congress uses the terms "interpreter and translator" together, it is clear that Congress understands the difference between the two. *E.g.*, 8 U.S.C. § 1555 ("Appropriations * * * provided for the Immigration and Naturalization Service shall be available for payment of * * * interpreters and translators who are not citizens of the United States."); 10 U.S.C. § 1596b (providing for the designation of "any foreign language for which there is a shortage of experts in translation or interpretation"); 22 U.S.C. § 2695a (a) ("[T]he Secretary of State is authorized to require the payment of an appropriate fee * * * for providing other Federal agencies with foreign language translation and interpretation services."); 28 U.S.C. § 530(I) (providing for the "payment of interpreters and translators who are not citizens of the United States"). In each instance, a definition of interpreter (or interpretation) that is inclusive of translator (or translation) would render the term translator (or translation) superfluous. This Court generally interprets terms in statutes to avoid the creation of superfluities. *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) ("It is, however, a cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.'") (quoting *United States* v. *Menasche*, 348 U.S. 529, 538-539 (1955)).

2. The Executive Branch also consistently distinguishes between interpreters and translators on precisely the same grounds.

The State Department's Language Services, which dates back to the Washington administration, has separate divisions for interpreting and translating. Matthew S. Klimow, *Language Services Information for Translators* 1.[18] The Interpreting Division of Language Services provides interpreters who provide "an equivalent oral communication between two or more different languages" for the Executive Branch. U.S. State Dep't Language Servs., *Interpreting*.[19] In comparison, the Translating Division of the Office of Language Services renders written communication from one language to another to those same entities. U.S. State Dep't Language Servs., *Translating*.[20]

Similarly, the Department of Defense distinguishes between the interpreter and translator functions. In describing the two roles, the United States Army explains that conducting interpretation involves "oral" conversions, while "preparing translations" requires "written" transcription

---

[18] Available at http://languageservices.state.gov/Content/documents/LS%20information%20for%20translators.pdf.

[19] Available at http://languageservices.state.gov/content.asp?content_id=178&menu_id=110.

[20] Available at http://languageservices.state.gov/content.asp?content_id=177&menu_id=110.

"between English and a foreign language." U.S. Army, *Careers & Jobs*.[21]

The Bureau of Labor Statistics draws the same distinction, defining an interpreter as one who "convert[s] one spoken language into another—or, in the case of sign-language interpreters, between spoken communication and sign language." U.S. Bureau of Labor Statistics, *Interpreters and Translators*, Occupational Handbook 1 (2010-2011).[22] Translators, by contrast, "convert written materials from one language into another." *Ibid.*

3. Finally, this Court, in its own Rules, uses the term translation to refer to the translation of written documents. U.S. Sup. Ct. R. 31 ("Whenever any record to be transmitted to this Court contains material written in a foreign language without a translation * * * the clerk of the court transmitting the record shall advise the Clerk of this Court immediately so that this Court may order that a translation be supplied.").

---

[21] Available at http://www.goarmy.com/careers-and-jobs/browse-career-and-job categories/intelligence-and-combat-support/interpreter-translator.html.

[22] Available at http://www.bls.gov/oco/pdf/ocos175.pdf.

III. Translation Costs Are Disproportionately Greater, More Uncertain, And More Difficult To Administer Than Interpretation Costs

A. Including Translation Fees With "Interpreter" Fees Would Substantially Increase Awardable Court Costs Under 28 U.S.C. § 1920

Reading 28 U.S.C. § 1920 to include translator fees not only errs as a matter of statutory interpretation, but would also inflict significant practical costs on the legal system. Since translation expenses are unpredictable and outside the reach of judicial supervision, granting translator fees under § 1920 would seriously affect federal litigation in a wide variety of cases.

Furthermore, there is evidence that awarding translation fees would significantly increase the awardable court costs under § 1920. In the district courts that have conferred translator fees to the prevailing party, translation expenses have often been substantial. In one case alone, for example, a federal district court awarded over $1 million in translator fees. See *Ortho-McNeil Pharm., Inc.* v. *Mylan Laboraties Inc.*, No. 1:02CV32, 2008 WL 7384877, at *10-*12 (N.D. W.Va. Aug. 18, 2008), aff'd in part, vacated in part, 569 F.3d 1353 (Fed. Cir. 2009). In other cases, translation expenses have totaled over $100,000. See, *e.g.*, *Gabriel Technologies Corp.* v. *Qualcomm, Inc.*, No. CV-08-1992, 2010 WL 3718848, at *10 (S.D. Cal. Sept. 20, 2010) (defendant asserted $220,800 in translation costs); *Trading Technologies Int'l* v. *ESpeed, Inc.*, 750

F.Supp.2d 962, 983 (N.D. Ill. 2010) (plaintiff accrued $109,614 in translation expenses).

In contrast to translation costs, interpreter fees are more finite—restricted to the amount of live oral testimony conducted during or before trial. Whether in the forum of a deposition, evidentiary hearing, or live trial witness testimony, interpreter services are necessarily limited by duration and, in the case of courtroom interpretation, by direct judicial oversight. But "while there is a natural limit to the expense of interpreters—the amount of time that witnesses (including deponents) undergo live examination—there is no natural limit on the number of documents that can be translated in aid of a claim or defense." *Extra Equipamentos E Exportacao Ltda.* v. *Case Corp.*, 541 F.3d 719, 728 (7th Cir. 2008). This is reflected in the fact that translating costs can vary widely. *Rodriguez-Garcia* v. *Municipality of Caguas*, 787 F.Supp.2d 135, 148 (D.P.R. 2011) (translation costs of $2,000.00); *Conn* v. *Zakharov*, No. CV-1:09-0760, 2010 WL 2293133 (N.D. Ohio June 4, 2010) (translation costs of $15,106.20); *Qualcomm*, 2010 WL 3718848, at *12 (translation costs of $220,800); *Ortho-McNeil Pharm., Inc.*, 2008 WL 7384877, at *10-*12 (translation costs of $1,011,712.00).

Accordingly, it is common for translation fees to significantly exceed the costs of interpreter services. In *E & J Gallo Winery* v. *Andina Licores S.A.*, No. CV-F-05-0101 AWI LJO, 2007 WL 1589546, at *2 (E.D. Cal. June 1, 2007), accumulated translation expenses ($47,571.86) were more than ten times that of interpreter fees ($3,900). Moreover, when the Seventh Circuit recognized that § 1920 court costs do not encompass translation fees, the court

acknowledged that it was "ominous that 65 percent of the costs awarded in this case were for translation." *Extra Equipamentos E Exportacao Ltda*, 541 F.3d at 728. See also *Lopez Quinones* v. *Puerto Rico National Guard*, 715 F.Supp.2d 233 (D.P.R. 2010) ($5,791.11 in translation costs exceeded $1,434.70 in interpreter fees.); *Osorio* v. *Dole Food Co.*, No. 07-22693-CIV, 2010 WL 3212065 (S.D. Fla. July 7, 2010) (translation fees of $38,446.55 in comparison to interpreter costs of $4,359.49), report and recommendation adopted *sub nom.*, *Osorio* v. *Dole Food Co., Inc.*, No. 07-22693-CIV, 2010 WL 3212062 (S.D. Fla. Aug. 12, 2010).

Exorbitant translation expenses arise most commonly in multi-national patent infringement litigation. For example, *Ortho-McNeil Pharmaceutical, Inc.*, 2008 WL 7384877, which involved over $1 million in translator fees, was a patent infringement suit. Patent litigation frequently requires the translation of voluminous foreign patent materials. See, *e.g.*, *Espeed*, 750 F.Supp.2d at 982. In *Qualcomm*, 2010 WL 3718848 at *12, the defendant had to translate over "76 patents, * * * [with] 10,000 words per patent." Given the expanse of patent infringement disputes, often spanning several years and numerous foreign patent claims, litigation of this scale "can generate millions of pages of documents" requiring translation. *Extra Equipamentos E Exportacao Ltda*, 541 F.3d at 728; *Ortho-McNeil Pharmaceutical, Inc.*, 2008 WL 7384877, at *11

(involving approximately 20,000 pages of translated written documents).[23]

B. Awarding Translation Costs Would Impose A Substantial Burden On District Courts

Including translation fees in cost awards would also impose a substantial administrative burden on trial courts. For example, courts that—contrary to the plain language of § 1920—award translation costs typically require proof that the translations fees were "necessarily incurred." See, *e.g.*,

---

[23] For litigants, the impact of shifting translation fees remains uncertain. The looming threat of having to indemnify their opponent could deter the poor and risk-averse from beginning litigation needed to vindicate their rights. Cf. John F. Fargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567, 1635-1636 (concluding in the context of attorneys' fees that "[i]n general, the English Rule operates as a greater impediment to access to justice than does the American Rule"). The award of court costs under § 1920 covers many important federal rights, ranging from 42 U.S.C. § 1983 civil rights claims to 20 U.S.C. § 1400 et seq. education disability suits. See, *e.g.*, *Williams* v. *R.W. Cannon, Inc.*, 657 F.Supp.2d 1302 (S.D. Fla. 2009) (suit involving Fair Labor Standards Act); *Cuadrado-Ramos* v. *Commonwealth of Puerto Rico*, No. CV-09-1369, 2010 WL 1416016 (D. Puerto Rico Mar. 31, 2010) (suit under Individual with Disabilities Education Act); *Melendez-Benitez* v. *United States*, 498 F.Supp.2d 460 (D.P.R. 2007) (challenging I.R.S. assessment of tax liability under 26 U.S.C. § 6672); *Rodriguez-Garcia* v. *Municipality of Caguas*, 787 F.Supp.2d 135 (D.P.R. 2011) (raising § 1983 claim alleging retaliation for political activities). Because legislators are in a better position to evaluate the implications attending additional cost-shifting in federal litigation, courts should require a clear directive from Congress before shifting costs for translation.

Slagenweit v. *Slagenweit*, 63 F.3d 719, 721 (8th Cir. 1995); *Studiengesellschaft Kohle mbH* v. *Eastman Kodak Co.*, 713 F.2d 128, 133 (5th Cir. 1983); see also *Tilton* v. *Capital Cities/ABC, Inc.*, 115 F.3d 1471, 1479 (10th Cir. 1997) (requiring party to prove translation "necessary"). Even though § 1920(6) does not on its face limit costs, courts that (wrongly) have awarded translation fees under that statute have naturally been reluctant to shift to the losing party all of an opponent's translation fees, given the open-ended nature of translation expenses.[24] As a result, these courts have had to resolve subsidiary disputes about the volume and cost of translations.

This can create a battleground for parties to squabble over which documents "appear to be relevant" or necessary to the litigation. See, *e.g.*, *Studiengesellschaft*, 713 F.2d at 133; *Ricoh Corp.* v. *Pitney Bowes Inc.*, Civ. No. 02-5639 (GEB), 2007 WL 1852553, at *3 (D.N.J. June 26, 2007) (finding translation costs not "necessarily incurred"). Resolving these disputes requires that a court somehow distinguish between the thousands of pages of translated documents produced by the parties to determine which translation costs should be awarded. See *Extra Equipmentos E Exportacao Ltda.* v. *Case Corp.*, 541 F.3d 719, 728 (7th Cir.

---

[24] Notably, the absence of any limit in the text of the statute is further proof that Congress did not intend to include translation fees in § 1920. Other costs awarded by § 1920 that a party could run-up—such as transcripts and copies—include the "necessarily incurred" limitation in the text of the statute, whereas those a party is unlikely or unable to run-up—such as docket fees, court costs, fees and disbursements for printing and witnesses, and interpreter fees—do not.

2008). Some courts limit the scope of their examination by considering only translated documents a party submitted to the court during the litigation. See, *e.g.*, *E. & J. Gallo Winery* v. *Andina Licores S.A.*, No. CV F-05-0101 AWI LJO 2007 WL 1589546, at *2 (E.D. Cal. June 1, 2007). But other courts will consider awarding costs for any translated document. See, *e.g.*, *Hynix Semiconductor Inc.* v. *Rambus Inc.*, 697 F.Supp. 2d 1139, 1153 (N.D. Cal. 2010) (awarding costs for translations made to check accuracy of opponent's translations). That courts disagree on even this threshold issue demonstrates the complexities involved in this inquiry. Compare, *e.g.*, *ibid.* (allowing costs to check accuracy of opponent's certified translations), with *Ricoh Corp.*, 2007 WL 1852553, at *3 (denying costs because party "could reasonably have relied on the translation provided under oath" by opponent's translator).

Courts must also determine a reasonable rate that they can use to compute the cost of translation. Although the rates of interpreters are generally set by government agencies, see, *e.g.*, United States Courts, *Current Fees for Contract Interpreters*,[25] "[t]ranslators usually can set their own rates." Judith Kenigson Kristy, *Translators and Interpreters: Cut From The Same Cloth?*, Vol. XVI, No. 1 Proteus: The Newsletter of the National

---

[25] Available at http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts/CourtInterpreters/ContractInterpretersFees.aspx.

Association of Judiciary Interpreters 1, 7 (2007).[26] Rarely can courts rely without scrutiny on the rate paid by the party that incurred the translation expenses. Courts instead need to analyze invoices so they can exclude the cost of special services such as rush translation and delivery. See, *e.g.*, *Osorio* v. *Dole Food Co.*, No. 07-22693-CIV, 2010 WL 3212065, at *11 (S.D. Fla. July 7, 2010), report and recommendation adopted *sub nom.*, *Osorio* v. *Dole Food Co., Inc.*, No. 07-22693-CIV, 2010 WL 3212062 (S.D. Fla. Aug. 12, 2010).

Cases involving multiple translators—all charging different rates—add further complication. A prevailing party will not want the court simply to apply a flat rate across all documents. Rather, they will request that courts assess higher rates for certain translations, forcing courts to examine invoices even more closely. See, *e.g.*, *Ortho-McNeil Pharm., Inc.* v. *Mylan Laboratories, Inc.*, No. 1:02CV32, 2008 WL 7384877, at *11 (N.D. W. Va. Aug. 18, 2008) (suggesting court would consider party's actual costs if party could match invoices to specific translated documents), aff'd in part, vacated in part, 569 F.3d 1353 (Fed. Cir. 2009).

As translation fees can dwarf other costs, parties will have substantial incentives to fully litigate these disputes, consuming scarce judicial resources. "Without a clearer directive from Congress," courts should not "be required to wade into such issues." *Extra Equipmentos*, 541 F.3d at 728.

---

[26] Available at http://languageaccess.us/Documents%20and%20Links/Translators%20&%20Interpreters.pdf

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

DANIEL R. ORTIZ
JAMES E. RYAN
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

MARK T. STANCIL*
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411
Washington, DC 20006
(202) 775-4500
mstancil@robbinsrussell.com

JOHN P. ELWOOD
Vinson & Elkins LLP
2200 Pennsylvania Ave., N.W., Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

DAVID T. GOLDBERG
Donahue & Goldberg, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

* *Counsel of Record*

NOVEMBER 2011